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Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DEBRA ROWINSKY, as next friend of
"JANE DOE" and "JANET DOE," her minor children,
and for all those similarly situated,

Petitioner

V.

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

When a school district knows peer sexual harassment is so severe and pervasive on its campuses and school buses that it creates a hostile or harmful school atmosphere for young female students, but the district fails to take reasonable steps to prevent or curtail such sexual harassment, does the school district violate Title IX?

PARTIES TO THE PROCEEDINGS

The parties to this case are:

Petitioner: Debra Rowinsky, as next friend of "Jane Doe" and "Janet Doe," her minor children, and for all those similarly situated.

Respondent: Bryan Independent School District.

Counsel is unaware of any other person or entity with a financial interest in the outcome.

Counsel in this case are:

James C. Harrington and Peter Hofer of the Texas Civil Rights Project (Austin, Texas), for Debra Rowinsky, Petitioner.

Jennifer W. Jacobs and Lisa A. Brown of Bracewell & Patterson, L.L.P. (Houston, Texas), for Bryan Independent School District, Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

In the opinion below, the Court of Appeals for the Fifth Circuit held that Title IX generally imposes no duty on a school district to respond to sexual harassment committed by students, no matter how severe, widespread, or rampant the hostile environment it creates.

A school district, under the Fifth Circuit's logic, incurs liability only if its employees directly participate somehow in developing the hostile environment. Otherwise, the district is safe from liability, no matter how pervasive the harassment and no matter if the district is aware of the hostile environment but refuses to take remedial action.

This decision is in direct conflict with a recent decision of the Court of Appeals for the Eleventh Circuit, with the decisions of other Courts of Appeals, with various district courts, and with the official position of the United States Department of Education's Office for Civil Rights (OCR), the agency responsible for enforcing Title IX, which hold schools responsible for remedying peer sexual harassment of which they knew or should have known.

The decision below has national ramifications, not only because of its conflict with the Eleventh Circuit, but also because it requires OCR to apply different Title IX standards in different jurisdictions, a result clearly contrary to Congressional intent.

The Fifth Circuit decision is at great odds with Title IX's broad prohibition of sex discrimination in federally funded educational activities and programs. Title IX protects young women attending school in some parts of the country from humiliating peer harassment that threatens their ability to pursue an education and jeopardizes their school performance and personal well-being. Young women who attend school in the Fifth Circuit, however, now have no Title IX right to an education free from debilitating peer harassment and no recourse from oppressive sexual abuse perpetrated by their male counterparts.

This Court's judgment on the issue of peer sexual harassment in education is needed to resolve the conflicts among the courts of appeals and confusion in the district courts, to clarify the proper scope of Title IX for courts around the country, and to fulfill Congress's intent that women and girls have equal access to educational opportunity free of debilitating sex discrimination.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is to be reported at 80 F.3d 1066. The unpublished opinion of the United States District Court, Southern District of Texas (December 21, 1994) is in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was filed on April 2, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of Education Amendments of 1972
20 U.S.C. § 1681 et seq. and 34 C.F.R. §§ 106.8, 106.9
These provisions are in Appendix C.

STATEMENT OF THE CASE

Proceedings Below

In late 1993, Debra Rowinsky brought suit on behalf of her two daughters ("Jane" and "Janet Doe"), then in junior high school, and for the class of similarly situated young women, alleging that Bryan Independent School District (BISD) condoned and did not effectively curtail a persistent pattern of peer sexual harassment against girls on its school buses and its Sam Rayburn Middle School campus.[1]

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[1] Although Mrs. Rowinsky filed her case as a class action, and alleged facts supporting it, the trial court never reached this issue because it disposed of the case on summary judgment.

Mrs. Rowinsky sought declaratory and injunctive relief, as well as compensatory damages and attorney's fees, under Title IX of the Education Amendments Act of 1972 (20 U.S.C. § 1681 et seq.).[2] The trial judge granted summary judgment against her under Rule of Civil Procedure 56(c).[3]

Statement of Facts

Because this case is before the Court on summary judgment, this Court takes all the facts alleged by Mrs. Rowinsky in the record as true and resolves all fact disputes and draws reasonable inferences in her favor.[4]

Mrs. Rowinsky alleged that, throughout the 1992-93 school year, a pervasive pattern of hostile environment sexual harassment existed at BISD that adversely affected her daughters and many other young female students. BISD knew of this nine-month-long pattern of harassment, but refused to effectively curtail the degrading behavior. As a result, Mrs. Rowinsky's daughters suffered in their ability to concentrate on school work and in their emotional and psychological well-being, and were denied their right to attend school in a non-discriminatory environment.

Throughout the year, Mrs. Rowinsky, her daughters, and others repeatedly, but unsuccessfully, complained to

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[2] Briefly, Title IX requires a school district receiving federal funds enact and enforce certain procedures designed to limit discrimination in its educational programs. BISD is a recipient of such federal financial assistance.

[3] Mrs. Rowinsky raised other legal claims as well. She appealed only from summary judgment on the Title IX claim, unsuccessfully, and seeks a writ of certiorari on that point alone.

[4] The appellate decision omitted a great many facts alleged by Mrs. Rowinsky to show the persistent hostile environment sexual harassment, including the extensive number of complaints BISD had received and the experiences of Student J.S.. Those are included in this petition.

BISD officials about the widespread sexual harassment. R.Vol.7 at 1367 ¶¶4,6; 1365 ¶11; 1361 ¶4; 1361-60 ¶¶5,7; 1355 ¶4; 1354 ¶¶7,10; 1352 ¶15; 1351 ¶19; 1350 ¶¶23,25.[5] BISD's refusal to take action to end the sexual harassment caused a hostile environment to exist during the entire year.[6]

Beginning in September 1992, Jane and Janet, both eighth graders, were subjected to persistent degrading physical and verbal sexual assaults on a BISD school bus. Id. at 1367 ¶2; 1361 ¶3. A male student, G.S., abused Janet, physically and verbally. He regularly swatted her bottom whenever she walked down the aisle of the school bus and made ridiculing and debasing comments, such as, "When are you going to let me fuck you?", "What bra size are you wearing?", and "What size panties are you wearing?" He also called her a "whore." As time went on, his harassment became more abusive; he even groped her genital area, which humiliated Janet. R.Vol.7 at 1361 ¶3.

During the first few weeks of the school year, Janet complained to Bob Owens, her bus driver, no fewer than eight times about G.S.'s physical and verbal abuse. Id. at 1361 ¶4. However, Owens never took any action. His inaction discouraged Janet; she stopped reporting the incidents to him, and the harassment continued. Id. at 1360 ¶6. Mrs. Rowinsky also complained to Owens about the sexual assaults on her daughters and other girls on the bus; but he ignored her, too. Id. at 1355 ¶4.

Owens was fully aware of the sexual harassment on

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[5] Because the mandate has yet to issue in the Court of Appeals, the clerk could not release the record to Petitioner, making it impossible for her to expand on or amplify the record citation.

[6] The hostile environment sexual harassment actually continued well beyond the 1992-93 school year, as demonstrated by the unfortunate experiences of Student J.S., described below.

his bus. During an investigation a year later by the U.S. Department of Education's Office for Civil Rights (OCR), Owens admitted he regularly heard students on the bus use degrading language, such as "bitch" and "whore," but ignored it because it was a "common way of life for the students." Moreover, Owens acknowledged to OCR that students had reported to him incidents of abusive sexual contact. He conceded "there could have been a pattern of sexual nature type offenses within his bus." R.Vol.7 at 1323.

As a result of Owens' refusal to correct the sexual harassment on the bus, G.S. escalated his abusive behavior. On September 24, he sexually assaulted Jane; he forcibly grabbed and squeezed her genital area. She pushed him away and tried to get away from him, but he followed and grabbed her breasts. The assault traumatized Jane, and she arrived home very upset and shaking.

This latest attack and lack of response to prior numerous complaints angered Jane and Janet's parents. They went with their daughters the next day to complain to Assistant Principal Randy Caperton at Sam Rayburn School. Caperton told the Rowinsky family he had heard about the sexual assault and believed the attack merited expelling G.S. Id. at 1367 ¶¶5,6; 1361-60 ¶5; 1355 ¶5; 1354 ¶¶7,8.[7]

On September 29, Mrs. Rowinsky again visited Caperton about the sexual harassment. He showed her a shoddily written report on the incident with G.S. The report did not even name G.S. as the assailant and contained various discrepancies, such as an incorrect date of the incident. Mrs. Rowinsky told Caperton, as she had told Owens, that other girls on the bus also were suffering sexual harassment, and identified four by name. Id. at 1354-53 ¶10; 1331.

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[7] After the meeting with Caperton, Jane and her parents filed sexual assault charges against G.S. with the city police.

G.S.'s only punishment for sexually assaulting Jane was a three-day suspension from the bus. On his return, G.S. was to sit in the second row, behind Owens. BISD never punished him for molesting Janet. Id. at 1349 ¶27.

When G.S. resumed riding the bus, he was undeterred and continued his sexually assaultive behavior. With Owens nearby, G.S. directed abusive and humiliating words toward Jane and Janet, like "whore," "bitch," and "trick," and slapped Janet on her bottom. Id. at 1366 ¶9; 1360 ¶6.

BISD authorities did not enforce G.S.'s seat assignment; he sat wherever he pleased with impunity and continued his disgusting sexual harassment. Id. at 1367-66 ¶6; 1366 ¶10; 1360 ¶¶6-8,10. BISD's lack of attention to their earlier complaints sufficiently discouraged Jane and Janet that they did not report G.S.'s continued assaults; they felt BISD authorities would not do anything. Id. at 1366 ¶10. Mrs. Rowinsky, however, called Jay Anding, Assistant Director of the BISD Transportation Office, and demanded that he restrict G.S.'s seating on the bus because of his persistent sexual assaults. Mrs. Rowinsky's call produced no results.

On December 16, another male student (L.H.) sexually assaulted Jane and Janet. On the morning bus ride, he pushed his hand up under Janet's skirt and shouted, "I almost got pussy!" Janet, frightened and humiliated, resisted and hit him to make him stop; but L.H. forced his hand up her skirt and grabbed her genital area. Janet went to Owens as soon as the bus stopped at a red light and complained; but he ignored her and refused to respond. On the afternoon bus ride, L.H. this time pushed his hand up Jane's skirt and grabbed her genital area. Jane was so humiliated and frightened that she did not complain to Owens, and even waited until the following day before telling her mother. Id. at 1365 ¶¶7,11-12; 1360.

Mrs. Rowinsky again contacted Anding, this time to complain about L.H.'s sexual assaults. She also informed

him that other girls were being sexually molested and gave him their names, as she had done with Caperton on September 29, and with Owens prior to that. Anding said he would investigate that very day, but he never contacted Mrs. Rowinsky again. Id. at 1352 ¶¶15,17.

In early January 1993, Mrs. Rowinsky contacted Caperton to learn the results of the investigation. He admitted Anding had not conducted the investigation and said that, for punishment, L.H. was suspended for just three days for assaulting Jane. L.H. never received any discipline for assaulting Janet. Id. at 1352-51 ¶18; 1349 ¶27.

The next day, Mrs. Rowinsky contacted Dr. Tom Purifoy, Director of Secondary Education (and, unbeknownst to Mrs. Rowinsky, BISD's Title IX coordinator). She described the degrading physical and verbal sexual assaults. Despite being Title IX coordinator, Purifoy did not inform Mrs. Rowinsky about Title IX, as required by law, and did not conduct an investigation or take remedial action to end the hostile environment sexual harassment. Id. at 1351 ¶19.

All these complaints notwithstanding, a new bus driver, who had taken Owens' place, rather incredibly assigned Jane to the seat right next to G.S. Jane feared G.S. would attack her again. Accordingly, Mrs. Rowinsky removed her daughters from the bus until BISD could ensure a safe atmosphere for them. Id. at 1365 ¶13; 1351 ¶21; 1321.

Mrs. Rowinsky then went to Dr. Purifoy and requested that he remove G.S. from the bus. Purifoy refused to take any action without "proof" of the assaults and declined to accept anything from the transportation office as the "proof" he required. Id. at 1351-50 ¶22.

On March 30, Mrs. Rowinsky met with Dr. Sarah Ashburn, BISD Superintendent, to complain about G.S.'s sexual assaults. Ashburn said the three-day bus suspension was sufficient punishment and refused to take further action.

Ashburn did not inform Mrs. Rowinsky about Title IX or its grievance procedures.[8] Id. at 1350 ¶23.

The ongoing hostile environment also manifested itself in sexual harassment in the classroom. That same day, during class, a male student, F.F., reached up under Janet's shirt and quickly unfastened her bra. As discipline, Vice Principal Petty sent F.F. home for the rest of that day and the next (id. at 1360 ¶8), a rather mild form of punishment, if any at all.

The following day, Mrs. Rowinsky visited Petty and complained about the assault perpetrated by F.F. Petty did not consider his conduct to be sexual: "it sounded like something my husband or yours might do." For Mrs. Rowinsky, this comment showed ignorance in dealing with sexual harassment for young girls. Id. at 1350 ¶25.

Mrs. Rowinsky again met with Ashburn and protested the failure to take action against G.S. and L.H. Ashburn did not consider what had happened to Jane and Janet to be assaults and refused further action. Id. at 1349 ¶28.

Because every BISD official she contacted repeatedly refused to take action to end the sexual assaults and harassment and because Jane and Janet feared for their safety, Mrs. Rowinsky felt compelled to transfer her daughters out of BISD. Id. at 1365 ¶14; 1359 ¶9; 1349 ¶29.

During the nine long months Jane and Janet endured this gauntlet of humiliating and degrading harassment, BISD was made aware of at least 253 other sexual related com-

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[8] No BISD official informed Mrs. Rowinsky or her daughters about Title IX's prohibition on sex discrimination or advised them of any Title IX grievance procedures. R.Vol.7 at 1354 ¶¶7,19,22,23,28. Mrs. Rowinsky, without any help from BISD, eventually filed a complaint, on May 11, 1993, with the Office for Civil Rights of the U.S. Department of Education (id. at 1345). Mrs. Rowinsky learned about Title IX through a television program, "Street Stories."

plaints involving students -- 76 at Sam Rayburn School alone. Id. at 1317-15. Such a substantial number of incidents should have sounded a clear warning bell that something was gravely wrong at BISD.

Sexual harassment became an accepted norm at BISD; it affected other young women who walked its hallways and rode its buses. For example, another BISD middle school student ("Student J.S.") suffered from the same hostile sexual environment that permeated Sam Rayburn School, which, except for ten weeks, she attended from August 1992 to December 1993.[9]

During September 1992, a group of male students on her bus began a vicious, relentless campaign of molesting Student J.S. Daily, they would pinch and slap her breasts, thighs, and buttocks, leaving bruises on her body. They verbally abused her with names like "whore," "white bitch," "white ho," and "boots and boobs." Id. at 1301 ¶2; 1300 ¶3; 1289 ¶4; 1283 ¶4. The assaults continued as long as Student J.S. attended school that year.

As happened with Jane and Janet, Student J.S. lodged complaints with BISD administrators, teachers, and transportation officials, all of which went unaddressed. She complained during the same time period that BISD officials were receiving complaints from Jane, Janet, and Mrs. Rowinsky. Id. at 1300 ¶¶4-10,12,19,32,33,36; 1367 ¶¶3-6,11.

BISD officials never investigated a single one of J.S.'s numerous complaints or advised her about Title IX. In fact, on several occasions, reflecting their arcane and chauvinist

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[9] Student J.S. is currently involved in litigation similar to this. J.W., as next friend of her minor daughter v. Bryan Indep. School Dist., No. 95-20643 CIVIL (5th Cir.). The trial court also dismissed her case; it is now pending in the Court of Appeals, although, in light of Rowinsky, its fate is fairly easy to discern.

view of blaming the victim, the officials faulted Student J.S.'s attire or her behavior for the steady stream of verbal and physical sexual assaults she endured. Id. at 1300-1299 ¶9; 1294 ¶36; 1279 ¶5. They refused to discipline her assailants.

During the 1992-93 school year, J.S. lodged at least twenty complaints with her bus driver. She regularly named several male students on the bus. Other female students on the bus witnessed these same incidents. Id. at 1300 ¶4; 1290-89 ¶¶3,4; 1283 ¶¶3,5.

In September 1992, Assistant Principal Caperton contributed directly to the hostile environment by verbally abusing Student J.S. and her friends. When a group of nine female students, including Student J.S., passed Caperton in the hallway, he stopped them and told them they "looked like a bunch of little 'ho's' [slang for whore]...." Id. at 1299 ¶11; 1288 ¶10; 1283 ¶6.[10]

In October, a student, "O.W.," threatened to "fucking kill" Student J.S. for reporting an assault on the bus. He repeated his threat in front of Principal Harrison Crenshaw. Crenshaw gave O.W. a one-day suspension for using offensive language in front of him, but totally ignored the sexual misconduct on the bus or the threat. Id. at 1298-97 ¶15.

Because of the on-going sexual assaults, Student J.S. had to take prescribed anti-depressants for insomnia, anxiety, and depression. In November and December, she attended school in Louisiana and Wichita Falls, Texas, for health and safety reasons. She re-enrolled at Sam Rayburn in January 1993. Id. at 1297 ¶21; 1296 ¶¶22,23; 1277-76 ¶10; 1276 ¶¶12,14, 15. Her depression worsened, and she was admitted to a mental health center for three weeks, after which she

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[10] The Fifth Circuit ignored this important allegation. However, it shows the contributing role BISD administrators played in the development of the hostile atmosphere of sexual harassment.

returned to school. Id. at 1296 ¶28; 1276 ¶18; 1275 ¶20.

In March 1993, O.W. and a group of male students assaulted Student J.S. in the school hallway, grabbing her breasts and genital area. In self-defense, she kneed O.W. in the groin. The other male students taunted her with names. Principal Crenshaw, who witnessed this incident, disciplined Student J.S. with a three day in-school suspension, but did not punish any of the boys. Id. at 1276 ¶¶21-22.

In April, a school counselor suggested that Student J.S. enter the special education program because of her declining grades and on-going harassment from O.W. and his friends. Id. at 1294 ¶¶34,35; 1274 ¶25. This approach again reflected BISD's practice of blaming the victim, and not the perpetrator. Student J.S. eventually left Sam Rayburn and was schooled at home. Id. at 1293 ¶¶41-42; 1273 ¶30.

BISD's capricious handling of Jane's and Janet's sexual harassment complaints, and those of Student J.S., demonstrates BISD did not have any policy concerning sexual harassment or, if it had one, it was not following it. Id. at 1135-25. Further, BISD did not train its employees about how to respond to sexual harassment of students, despite the hostile environment poisoning Sam Rayburn School.

One reason BISD's hostile environment thrived was because of inadequate discipline for sexual assaults and harassment. The BISD Discipline Management Plan requires expulsion of a student who assaults a teacher or other individual, or assignment to Special Opportunity School Placement (id. at 1123-18). However, as this case demonstrates, BISD has a custom or policy of treating sexual assault as a less serious offense than other assaultive behavior.

During school years 1992-1994, 112 incidents of fighting occurred at Sam Rayburn. BISD applied discipline consistently in those cases: 108 incidents resulted in suspensions from 1/2 days to 6 days. There were also three

expulsions and one in-school suspension. In contrast, BISD imposed mild punishment, or none at all, for sexual misconduct. For 122 sexually related incidents, there were only five suspensions, and no expulsions. Id. at 1267-1137, 1116-04.[11]

An OCR investigation in 1993 corroborated the sad state of affairs at BISD during the period when Jane, Janet, J.S., and other girls suffered sexual harassment and Mrs. Rowinsky tried to protect them by appealing to BISD authorities. OCR investigated whether BISD had failed to take appropriate action when it became aware female students were subjected to sexual harassment. Id. at 1346-03; 998-93. Students, school employees, and parents informed OCR they had witnessed numerous sexually related offenses on school buses, in classrooms, in hallways, and on school grounds during the 1992-93 school year. These were "a common occurrence throughout the district."[12] Id. at 1325, 1318.

OCR's 43-page report recorded 254 sexual misconduct incidents during the 1992-93 school year alone and found that, "due to the persistent and overt nature of the incidents ... BISD had sufficient notice to conclude that a sexually

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[11] The point of these statistics is not to raise the issue that boys and girls might suffer differential discipline, as the Court of Appeals seemed to suggest, but to show BISD's startling lack of resolve to curtail evident, pervasive sexual harassment.

[12] OCR interviews with male and female students who rode on Jane and Janet's bus during the 1992-93 school year corroborated that G.S., L.H., and other male students engaged in patently offensive conduct throughout the year. The OCR report revealed the following daily occurrences on the bus: (1) male students would call girls "bitch," "whore," "trick," and "slut"; (2) obscene sexual language would be used, such as "I want some pussy," "when and where do you want it," "you got big tits," "I have f____d her"; and (3) male students would touch girls on their legs, genital area, posterior, and breast. R.Vol.7 at 1324.

hostile environment had developed." Id. at 1307, 1309.[13]

OCR further "determined that BISD's sanctions [for sexual assault] were not calculated to end the sexually hostile environment or ... prevent future acts of sexual harassment...." OCR "concluded that [BISD] failed to take timely and effective responsive action to address sexual harassment which denied female students, because of their sex, equal educational services," in violation of Title IX. Id. at 1307.

BISD totally ignored Title IX regulations; it did not adopt and publish grievance procedures for student complaints alleging acts prohibited by Title IX.[14] It did not publish a notice of a non-discrimination policy in local newspapers to the effect that BISD may not discriminate on the basis of sex in its educational programs or activities. Id. at 915.[15] During the 1992-93 school year, BISD did not distribute any written nondiscrimination policy to students.[16] Nor did the 1992-93 Student/Parent Handbook or the 1992-93 Discipline Management Plan list a Title IX coordinator, with the requisite name, address, telephone number, and statutory duties.

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[13] OCR reported that 162 (or 63.7%) of these incidents occurred at the middle school level, providing a strong signal to BISD that a serious and pervasive sexual hostile environment had developed and that the district should take effective remedial steps. Id.

[14] 34 C.F.R. § 106.8(b). Neither the 1992-93 nor 1993-94 Student/Parent Handbook had any grievance procedure for Title IX complaints. BISD incorrectly relies on a generic complaint procedure to satisfy its Title IX obligations. The procedure provides no notice of mechanisms for complaints as to BISD's non-compliance with Title IX and lists no actions prohibited by Title IX. R.Vol. 7 at 911-857.

[15] 34 C.F.R. §106.9 requires a recipient of federal aid, like BISD, to publish its non-discrimination policy in local newspapers.

[16] Id. §106.8(a)

This case is not a situation in which a few isolated incidents of sexual harassment occurred; far from it. Rather, BISD, repeatedly put on notice about the widespread oppressive sexual intimidation and assaults lurking throughout its system, showed the most callous lack of concern possible for the young women in its charge.

Congress, through the exercise of financial largesse, sought to prevent, and effectively remedy, this sort of sexual discrimination.[17] This case therefore must provide a remedy for BISD's cold and calculated disregard of young female students subjected daily to verbal and physical assaults. Justice has yet to be served in the school buses and classroom corridors of BISD.

This Court should grant the writ of certiorari, reverse the Court of Appeals, and find that such a cause of action exists. This will allow Mrs. Rowinsky her day in court to try to hold Bryan ISD liable for the hostile environment it allowed to exist, even fester, which adversely affected young women in its schools in violation of Title IX.

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[17] Sexual harassment affects millions of young women in the nation's schools, robbing them of an equal education and of their self esteem. One recent survey of 1600 public school students, which Ms. Rowinsky entered into the trial court record, found that 85% of female students experienced some form of sexual harassment during their school lives; and 80% of sexual harassment is inflicted by peers. See "Hostile Hallways: AAUW Study on Sexual Harassment in America's Schools," American Ass'n of University Women Educational Foundation. Harris Scholastic Research (June 1993), pp. 22-24.

REASONS FOR GRANTING THE WRIT

1. This Court should resolve the serious decisional conflicts among the courts of appeals and district courts as to whether Title IX applies to peer hostile environment sexual harassment in elementary and secondary schools.

The lower courts have sought to interpret this Court's few decisions under Title IX and apply them to claims of hostile environment sexual harassment in schools. The results have been mixed, although the trend seemed to be moving in the direction recently recognized by the Eleventh Circuit. This case from the Fifth Circuit exacerbates the decisional confusion, which, in turn, undermines nationwide uniform application of Title IX and throws OCR's administration of the statute into chaos, effectively causing the enforcement of different Title IX standards in different jurisdictions.

a. This Court has recognized that sexual harassment which creates a hostile environment falls within Title IX prohibitions.

Rowinsky conflicts with, and weakens, prior opinions of this Court which recognize that sexual harassment in schools violates Title IX -- without the need to show school district policy.

This Court has acknowledged the expansiveness of Title IX's prohibitions against sex discrimination in schools, according Title IX "a sweep as broad as its language."[18] In Cannon v. University of Chicago,[19] the Court found a private right of action to be consistent with the goals of Congress in enacting Title IX.

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[18] North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982).

[19] 441 U.S. 677, 704 n.36 (1979).

In Franklin v. Gwinnett County Public Schools,[20] the Court applied Cannon and recognized an action for students subjected to hostile environment sexual harassment. Franklin involved a teacher who sexually abused and assaulted a student; it was not "quid pro quo" harassment because he did not link his misconduct to an educational opportunity or benefit.

Franklin held that Title IX requires schools to stop sexual harassment of students by teachers in order to ensure that students are educated in a harassment free environment. Hostile environment harassment is a prohibited form of sex discrimination in schools.[21]

The school's "duty not to discriminate" rests, in part, on its ultimate authority to govern its own environment; a student's educational options, when facing a hostile sexual environment, are severely limited. Because schools "serve as the parent and student's 'home away from home' for seven or more hours of the day,"[22] the problem of peer sexual harassment merits the same treatment as teacher harassment.

Schools cannot disclaim liability for hostile environment sexual harassment simply because other students are the primary harassers. By recognizing Christine Franklin's hostile environment claim, the Court left no doubt that Title IX prohibits sexually hostile educational environments. This

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[20] 503 U.S. 60 (1992).

[21] Id. at 75, citing Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 64 (1986). The Court found added support for its holding in Franklin in passage of the 1986 Rehabilitation Act Amendments (42 U.S.C. § 2000d-7) and the 1987 Civil Rights Restoration Act (Pub. L. 100-259, 102 Stat. 28). Congress intended Title IX to have the very broad sweep necessary to combat sex discrimination in education. Id. at 72-73.

[22] JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Minn. L. Rev. 163, 171 (1992).

Court refused to read into Title IX any limitations that contravene its language and intent. The Court of Appeals, however, erred in limiting Title IX in this case.

In light of the appellate ruling below, the Court must clarify for the lower courts that Title IX does reach claims of official intentional inaction in the face of an environment of peer sexual harassment.

b. The circuit courts of appeal are in conflict on Title IX's application to peer sexual harassment.

This Court's guidance is critical in resolving the substantial conflict among the federal courts, appellate and trial, on Title IX's applicability to peer sexual harassment. The Court's guidance is also required to assure nationwide uniformity in enforcing Title IX as to peer sexual harassment, by courts and agencies alike.

The Eleventh Circuit in Davis[23] held that a female student stated a Title IX claim for damages against the school district for the sexually hostile environment created by a fellow student's harassment: "when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has 'be[en] denied the benefits of, or ... subjected to discrimination under' that educational program

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[23] Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996). Like Rowinsky, Davis involved repeated physical and verbal sexual harassment of a female student by a fellow student. Despite numerous requests to school officials, the district failed and refused to discipline the harasser and ignored the abuse. The hostile environment seriously affected her mental and emotional health; she even wrote a suicide note.

in violation of Title IX...."[24]

Moreover, the First, Second, Ninth, and Tenth Circuits all have implied that a Title IX action may arise from a school district's deliberate inaction. The First Circuit has indicated that a plaintiff can make out a peer sexual harassment case, using Title VII caselaw by analogy.[25] The Second Circuit has written that a school may be liable under standards similar to Title VII, where supervising authorities "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."[26] The Ninth Circuit has stated that school officials might be reasonably concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment.[27] In yet another case, the Tenth Circuit, while finding the plaintiff had not met the elements for sexual

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[24] Id. at 1194. Davis requires that a plaintiff, to prove a peer sexual harassment case, show: (1) she is a member of a protected group, (2) who was subjected to harassment, (3) that was based on sex; (4) and which was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) to establish some basis for institutional liability. Id.

[25] Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (not finding peer sexual harassment, using Title VII standards).

[26] Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995), citing Catcher v. Rosa & Sullivan Appliance Ctr, 957 F.2d 59, 62 (2d Cir. 1992).

[27] Clyde K. v. Puyallup School Dist., No. 3, 35 F.3d 1396, 1402 (9th Cir. 1994), citing Doe v. Petaluma City School Dist., 830 F.Supp. 1560, 1571 (N.D. Cal. 1993).

harassment, has used the test set out in Davis.[28]

In Rowinsky, the Fifth Circuit refused to recognize a Title IX claim for peer sexual harassment, and created conflict with the decisions of other circuit courts.[29] The Court should resolve this conflict in the interest of uniform national enforcement of Title IX on this important issue.

c. District courts also show inconsistency in applying Title IX to peer sexual harassment.

District courts likewise have struggled with the issue and reached widely conflicting conclusions about using Title IX to remedy a school's failure to correct a hostile environment created by peer sexual harassment. Some courts recognize such an action; others do not.

For example, in a Missouri federal case (Bosley v. Kearney R-1 School District[30]), an elementary student suffered severe peer sexual harassment, causing her to require psychological treatment and withdraw from school. Applying this Court's holding in Harris v. Forklift Systems, Inc.,[31] Bosley ruled the key to a hostile environment sexual harassment claim is "whether members of one sex are exposed to disadvantageous terms or conditions ... to which members

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[28] Seamons v. Snow, __ F.3d ___, 1996 WL 233483 (10th Cir. 1996), citing Davis, 74 F.3d at 1192 (accepting Davis' analytical model for peer hostile environment sexual harassment claims).

[29] Rowinsky v. Bryan Indep. School Dist., 80 F.3d 1006 (5th Cir. 1996). The Fifth Circuit's opinion in this case was not unanimous. Judge Dennis's dissent very much mirrors Petitioner's argument here.

[30] 904 F.Supp. 1006 (W.D. Mo. 1995) (denying summary judgment for school district on Title IX claim).

[31] 510 U.S. 17 (1993).

of the other sex are not exposed."[32] A school district, once it becomes aware of oppressive, offensive behavior, must take prompt remedial measures "reasonably calculated to end the [sexual] harassment."[33]

Similarly, the Petaluma trial court found that Title IX prohibits hostile environment sexual harassment (although, to obtain damages under Title IX, one must prove intentional discrimination): "it would violate the Supreme Court's command to give Title IX a sweep as broad as its language to find that Title IX does not prohibit hostile environment sexual harassment."[34] In Petaluma, a female student complained of offensive sexual harassment by fellow classmates that took place daily, with little or no interference from school officials. Ultimately, she sought medical and psychological treatment and enrolled in a private school because she could no longer endure the harassment.[35]

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[32] Bosley, 904 F.Supp. at 1022 (citation omitted). The jury awarded the young girl $5,000 in damages. Bosley v. Kearney R-1 School Dist., No. 93-0759-CV-W-9 (W.D. Mo. Oct. 16, 1995). See also Wright v. Mason City Community School Dist., No. C-94-3056 (N.D. Iowa June 10, 1996) (awarding plaintiff damages for peer hostile environment sexual harassment).

[33] Bosley, 904 F.Supp. at 1023. The District Court held, following Franklin's logic, "the same rule as when an employer is held liable for a sexually hostile work environment under Title VII must apply when a school district has knowledge of a sexually hostile school environment and takes no action." Id. at 1021.

[34] Petaluma, 830 F.Supp. at 1571.

[35] Id. at 1564, 1566. The harassment in Petaluma included daily taunts about having sex with a hot dog, sexually explicit graffiti, and name calling such as "hot dog bitch," "slut," and "ho" (slang for whore). Id. at 1562-63.

In Oona R.-S. v. Santa Rosa City Schools,[36] a California district court interpreted Petaluma, with some variance, along with Ninth Circuit dicta in Clyde K.,[37] for the proposition that a school district violates Title IX by encouraging, or failing to appropriately respond to, sexual harassment of female students by male students: "[s]uch discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment."[38]

However, a Connecticut district court came to the opposite conclusion and held that a school's failure to protect students from peer harassment does not violate Title IX.[39]

2. This case presents a question of national importance, meriting the Court's action to ensure consistent and uniform nationwide agency enforcement of a school's duty under Title IX to prevent and curtail peer hostile environment sexual harassment of young female students.

The far-reach of Rowinsky undercuts Title IX guarantees to young women of a learning environment free of sex discrimination. By severely circumscribing a cause of action

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[36] 890 F.Supp. 1452 (N.D. Cal. 1995) (denying and granting various defense motions).

[37] Clyde K., 35 F.3d at 1401 (citation omitted) ("Given the extremely harmful effects [peer] sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools").

[38] Oona R.-S., 890 F.Supp. at 1469.

[39] Mennone v. Gordon, 889 F.Supp. 53, 58 (D.Conn. 1995).

for peer hostile environment sexual harassment, the Fifth Circuit undermined agency enforcement of Title IX's broad mandate to end sex discrimination in education. Indeed, Rowinsky may even weaken Title VI enforcement.

a. Rowinsky overrides OCR's uniform nationwide standards for Title IX enforcement.

Just as Rowinsky conflicts with developing case authority that properly applies this Court's precedent, so too does it collide with the U.S. Department of Education's OCR, charged with enforcing Title IX, which interprets peer harassment as a violation. The result is discordant nationwide OCR enforcement, a result Congress did not intend.

Rowinsky requires OCR to tell schools in the Fifth Circuit that they do not offend Title IX if they refuse to curtail known peer hostile environment sexual harassment. In contrast, consistent with Davis, OCR must advise schools within the Eleventh Circuit that they violate Title IX when they do not curtail the same peer sexual harassment.

This problematic comes about in part because the Fifth Circuit erroneously substituted its own judgment for OCR's application of Title IX. The court noted the OCR guidelines but paid them no respect because they did not include an explanation to the court's liking for OCR's decision to address peer harassment.[40]

Rowinsky contradicts this Court's well-established deference to a regulating agency's interpretation of ambiguities in the statute it oversees: "This view of the agency charged with administering the statute is entitled considerable deference; and to sustain it, we need not find that it is the only permissible construction ... but only that ... it is a sufficiently rational one to preclude a court from substituting its own judgment for that [of the agency] Train, Inc. v. NRDC,

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[40] Rowinsky, 80 F.3d at 1015.

421 U.S. 60 (1975)."[41]

OCR, through Letters of Finding, has determined that a student is subjected to sexual harassment when "unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct ... has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment."[42] OCR also has found that "[w]hen individuals who are participating in a program or activity operated by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others."[43] Finally, OCR has decided that, if "the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."[44] Nevertheless, in this case, the Fifth Circuit, with little reasoning, boldly rejected OCR's interpretations.

The Petaluma trial court recognized that OCR Letters of Finding are entitled to deference because "they express the opinion of an agency charged with implementing Title IX and

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[41] Young v. Community Nutrition Inst., 476 U.S. 974, 981-82 (1986), quoting Chemical Manufacturers Ass'n. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985).

[42] See Davis, 74 F.3d at 1192 (citing Letter of Finding by John Palomino, Regional Civil Rights Director, Region IV [July 24, 1992], Docket No. 09-92-6002, at 2).

[43] Id.

[44] Id. (citing Letter of Finding by Kenneth Mines, Regional Civil Rights Director, Region V [April 27, 1993], Docket No. 05-92-1174, at 2-4); see also Petaluma, 830 F.Supp. at 1573 (also citing Letter of Finding by Kenneth Mines, Docket No. 05-92-1174)

its regulations."[45] Upon examining OCR Letters of Finding, that court concluded that OCR "believes that an educational institution's failure to take appropriate response to student-to-student sexual harassment of which it knew or had reason to know is a violation of Title IX."[46] The Fifth Circuit should have accorded the same respect to OCR interpretations.

The Fifth Circuit erroneously concluded that no duty exists for districts to prevent and remedy peer hostile environment sexual harassment. A school district that fails or refuses to provide a non-hostile learning environment for young women should be held accountable, whether in the Fifth Circuit or elsewhere.

b. Rowinsky impacts on OCR's nationwide standards for Title VI (racial harassment) enforcement.

Further, the logical breadth of Rowinsky may have nationwide impact on Title VI[47] peer hostile environment racial harassment cases. In enacting Titles IX and VI, Congress sought to eradicate discrimination in educational programs tied to federal funding. A racially or sexually hostile environment bars the door to opportunity, and a school district participates in that discrimination when it ignores its legal duty to respond effectively and promptly to harassment, which it knows (or should know) to exist.

Unless this Court corrects the appellate court, the ultimate result of Rowinsky is to give schools in the Fifth Circuit license to ignore harmful, discriminatory behavior of students. Thus, schools that refuse to address environments they know to be infected with racial or sexual harassment commit no Title IX or Title VI violation. In other circuits,

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[45] Petaluma, 830 F.Supp. at 1573.

[46] Id.

[47] Title VI of 1964 Civil Rights Act, 42 U.S.C. § 2000d et seq.

notably the Eleventh, the law is otherwise. This absurd result flies in the face of the clear intent of Congress.

c. Titles VI, VII, and IX together present a Congressional plan to end discrimination and promote equal opportunity.

Titles VI, VII, and IX together comprise a comprehensive Congressional effort to rid the country's schools and workplaces of invidious race and sex discrimination that robs many citizens of equal opportunity and deprives the rest of the nation of their best skills and potential. Congress recognized the interconnection of these three pieces of civil rights legislation.[48] Rowinsky disrupts this scheme.

Congress patterned the provisions of Title IX on those of Title VI, borrowing from Title VI's prohibitions against racial bias in educational settings to eliminate sex discrimination in the same setting.[49] Congress relied on the experience gained under Title VI to define the scope and enforcement of Title IX.[50] Likewise, OCR, responsible for enforcement of both Title VI and Title IX, has valuable experience and expertise that guides a proper understanding of both Titles.

OCR guidelines interpreting the scope of Title VI explicitly address peer racial harassment and hold a school district liable for the hostile environment created by peer harassment if supervising authorities knew of and failed to

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[48] 118 Cong. Rec. 5803 (1972) (Senator Bayh).

[49] Title IX "sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." Id. at 5807.

[50] "The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility." Id.

eliminate the harassment.[51] OCR also has interpreted Title IX to require that educational institutions, once they know of peer harassment, take reasonable steps to eliminate it.[52]

Title VII's[53] extensive case law, which prohibits race and sex discrimination in the workplace, serves as an useful analog in understanding the scope of Title IX.[54] Title VII protects women against employment discrimination and safeguards their right to work in an environment free of debilitating harassment. Title IX protects women from the same discrimination in education.

Courts and administrative agencies have learned much about sexual harassment in the workplace that robs women of equal opportunity and hinders their performance.[55] We cannot disregard Title VII's teachings in understanding the pain and frustration of sexual harassment for young women struggling for equal educational opportunities at a delicate period of their lives. The Fifth Circuit erred in ignoring this

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[51] 59 Fed. Reg. 11448, 11449 (1994). See id. at 11451 (citing Title VII cases to show hostile environment harassment is discrimination).

[52] See Petaluma, 830 F.Supp. at 1572-73 (citing OCR policy and Letters of Finding).

[53] Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq.

[54] See Franklin, 503 U.S. 60; Murray, 57 F.3d 243; Davis, 74 F.3d 1186; Brown, 68 F.3d 525; Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Circuit 1988); (all applying Title VII standards to hostile environment sexual harassment in an educational setting).

[55] "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." Harris, 510 U.S. at 17.

valuable lesson.

3. The Court should correct the Fifth Circuit's decision which eviscerated core Title IX guarantees of equal educational opportunities for young women by denying that school districts have a duty to prevent and curtail peer hostile environment sexual harassment.

Because Congress intended Title IX to be a powerful tool to combat widespread discrimination facing women in education,[56] it imbued Title IX with an expansive reach to address the myriad forms of sex discrimination that prevent women and girls from obtaining an education equal to their male colleagues.

Congress wanted Title IX to help peel away the multiple layers of pervasive sex discrimination in education that block women's opportunities in the future: "because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."[57] Rowinsky lays a major obstacle on the road to equal opportunity.

CONCLUSION

The Fifth Circuit panel ignored or misapplied this Court's decisions in arriving at the conclusion that Title IX did not provide a cause of action for relief from the kind of pervasive and degrading hostile environment sexual harass-

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[56] Cannon, 441 U.S. at 704 n.36.

[57] 118 Cong. Rec. 5804 (1972) (Senator Bayh, Senate sponsor).

ment faced by Mrs. Rowinsky's daughters.

The Court of Appeals also declined to follow precedent developed by other Courts of Appeals, and discounted, wholesale, interpretative rulings by the Office for Civil Rights of the U. S. Department of Education.

Ultimately, the Fifth Circuit betrayed the ideals held out by Congress to the young women of this nation, that they be free of humiliating and abusive treatment that interferes with, and denigrates, the same educational opportunities accorded to their male colleagues.

Because of the national impact of this case and because of the injustice to Mrs. Rowinsky's daughters, Petitioner prays that the Court grant this petition for certiorari to the Court of Appeals for the Fifth Circuit.

Dated: June 28, 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the proper number of true copies of this document was mailed to Jennifer W. Jacobs and Lisa A. Brown, attorneys for Respondent, Bracewell & Patterson, S. Tower Pennzoil Place, 711 Louisiana St., Suite 2900, Houston, Texas 77002-2781, on June 28, 1996.

James C. Harrington

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20049

DEBRA ROWINSKY,
for Herself and as Next Friend of
"Jane Doe" and "Janet Doe," Her Minor Children,
and for All Those similarly Situated,

Plaintiff-Appellant,

VERSUS

BRYAN INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before GARWOOD, SMITH, and DENNIS, Circuit Judges.

JERRY B. SMITH, Circuit Judge:

This appeal presents the question of whether title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et *seq.* ("title IX"), imposes liability on a school district for peer

hostile environment sexual harassment.[1] We conclude that title IX does not impose such liability, absent allegations that the school district itself directly discriminated based on sex. Accordingly, the judgment of the district court is affirmed.

I.

During the 1992-93 school year, students proceeding in this litigation under the pseudonyms of Jane and Janet Doe were eighth graders at Sam Rayburn Middle School in the Bryan Independent School District ("BISD") who rode a BISD school bus to and from school. Boys and girls were required to sit on different sides of the bus, and the bus driver, Bob Owens, enforced the restriction, even, on occasion, telling Jane and Janet not to sit on the boys' side of the bus.

Beginning in September 1992, a male student, whom we identify only by his initials, G.S.," physically and verbally abused Janet on the bus. G.S. regularly swatted Janet's bottom whenever she walked down the aisle and made comments such as, "When are you going to let me fuck you?", "What bra size are you wearing?", and "What size panties are you wearing?" He also called Janet a "whore." At one point, G.S. groped Janet's genital area.

Janet complained to Owens no fewer than eight times that G.S. had swatted her and Jane on their bottoms and used foul language. Owens took down names on a pad of paper. Janet eventually stopped reporting the incidents.

On September 24, G.S. grabbed Jane in her genital area, and, a few minutes later, grabbed her breasts. Jane, Janet, and their parents visited Assistant Principal Randy

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[1] Title IX is enforceable through an implied right of action. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Caperton the next day to complain about the incident.[2] Caperton told the Rowinsky family that he had already heard about the sexual assault from another student and that he believed the nature of the assault merited expelling G.S. Caperton suspended G.S. from riding the bus for three days and required him to sit in the second row behind the driver.

On September 29, Mrs. Rowinsky visited Caperton again to discuss the incident, complaining that other girls were being harassed on the bus. Caperton showed her a bus report that documented the incident with Jane. The report, however, contained numerous inaccuracies, including the fact that it did not name G.S. and listed the wrong date and length of punishment. Caperton corrected the assailant's name in a new report.

The three-day suspension did not deter G.S. He violated the seating requirement, and, as a result, Owens restricted Jane and Janet to the front of the bus. Mrs. Rowinsky called Jay Anding, assistant director of the transportation office, and demanded that he restrict G.S. to the second row seat because of the continuing remarks and misbehavior. Anding told Mrs. Rowinsky that he would speak with Owens. In late November 1992, G.S., with Owens nearby, called the girls offensive names and slapped Janet's buttocks. Owens did nothing, and the girls did not file any complaints.

One morning in December 1992, another male student, whose initials are "L.H.," reached up Janet's skirt, made a crude remark about what he almost touched, and then grabbed her genital area. Janet complained to Owens at the next stoplight, but he "just stared into space." On the afternoon of December 16, L.H. reached up Jane's skirt, touching her near

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[2] The Rowinskys filed sexual assault charges against G.S. with the Bryan city police.

her panty line. Jane did not tell Owens about the incident.

On December 18, Mrs. Rowinsky contacted Anding regarding L.H.'s behavior and told Anding that other girls were being sexually assaulted and gave him their names. Anding said he would investigate the alleged problems on the bus and take action.

On January 12, 1993, Mrs. Rowinsky contacted Caperton to find out the results of the investigation. Caperton told her that Anding had not conducted the investigation but that L.H. had been suspended for three days.[3]

On January 13, Mrs. Rowinsky contacted Dr. Tom Purifoy, BISD director of secondary education, and described the assaults to him. Purifoy did not conduct an independent investigation but referred her to C.W. Henry, Anding's assistant.

On January 14, after reviewing videotapes from the bus, Henry assigned a new driver to replace Owens. There are no further allegations of harassment by G.S. thereafter.

On January 19, the driver assigned Jane the seat next to G.S. Although G.S. made no new assaults, Mrs. Rowinsky removed her daughters from the bus and, on January 22, requested that Purifoy remove G.S. from the bus. Purifoy refused to take any further action against G.S. without proof of the assaults from juvenile records.

On March 30, during class, a third male student, with the initials "F.F.," reached under Janet's shirt and unfastened her bra. The teacher in the classroom sent both students to Vice-Principal Sandra Petty, who sent Janet back to class and suspended F.F. for the rest of the day and the next day. F.F. is not alleged to have harassed or abused the girls further. The next day, Mrs. Rowinsky visited Petty and complained

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[3] L.H. is not alleged to have further harassed or abused the girls after his suspension.

about F.F.'s behavior; Petty responded that she did not consider F.F,'s conduct to be sexual.

On March 30, Mrs. Rowinsky and her attorney met with Dr. Sarah Ashburn, BISD superintendent, to complain about G.S.'s behavior. Ashburn said the three-day bus suspension was sufficient punishment. She did not inform them about the existence of title IX or any title IX grievance procedures.

On May 4, Mrs. Rowinsky met with Ashburn and complained about her failure to take action against G.S. and L.H. Ashburn considered her actions against G.S. sufficient and informed Mrs. Rowinsky that she did not deem what had happened to Jane and Janet to be assaults. She refused to take further action, in part because L.H. was no longer a student in BISD. Mrs. Rowinsky told Ashburn that she intended to file a grievance with the United States Department of Education Office of Civil Rights ("OCR").

II.

Debra Rowinsky brought this action for herself[4] and as next friend, on behalf of her minor daughters, Jane and Janet Doe, and all those similarly situated,[5] alleging that

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[4] We conclude that Rowinsky does not have standing to assert a personal claim under title IX. It is undisputed that she has standing, as next of friend, to assert the claims of her daughters, but nothing in the statutory language provides her with a personal claim under title IX. Even assuming that title IX protects persons other than students and employees, Rowinsky has failed assert that she was excluded from participation, denied the benefits of, or subjected to discrimination under any education program or activity. Absent such a claim, the plain language of title IX does not support a cause of action by Rowinsky.

[5] The district court did not rule on the request for class certification. The plaintiffs do not complain of that failure on appeal.

BISD and its officials[6] condoned and caused hostile environment sexual harassment.[7] Specifically, the complaint asserts that Janet was sexually harassed at Sam Rayburn Middle School ("the school") by a student and that Jane and Janet were sexually harassed by other school children while riding the BISD school bus. Rowinsky seeks declaratory and injunctive relief, as well as compensatory damages and attorney's fees under title IX.

The district court held that Rowinsky had failed to state a claim under title IX because there was no evidence that BISD had discriminated against students on the basis of sex; Rowinsky had failed to provide evidence that sexual harassment and misconduct was treated less severely toward girls than toward boys.

The court relied on a number of facts. The first was that boys who assaulted boys were punished in the same fashion as boys who assaulted girls. The court concluded that any disparity in punishments between particular incidents was not made on the basis of sex, because the individual incidents involved different levels of physical conduct. Moreover, misconduct by one of the harassers was never reported by the students. The second factor was that any failure to train employees would harm male and female victims of harassment equally.

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[6] The district court dismissed all claims against the officials of BISD, leaving the school district as the only defendant. Rowinsky has not appealed that decision.

[7] In his dissent, Judge Dennis opines that under the alleged facts, the school board "knowingly failed to take appropriate steps to protect Jane and Janet Doe from sexual harassment, abuse and discrimination . . ." Dissent at 3. We express no normative view regarding BISD's conduct, for our duty as a court is only to decide whether the alleged conduct or neglect is actionable under title IX.

III.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activities receiving Federal financial assistance." 20 U.S.C. § 1681 (a) (1993). At issue here is whether a school district may be liable under title IX when one student sexually harasses another.[8] At a broader level of generality, we are asked to decide whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other

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[8] Two months after this case was argued, the Eleventh Circuit held that title IX imposes liability on a school district for peer sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *suggestion for rehearing en banc filed.* Nothing in *Davis* alters our analysis, however. As will become evident, we disagree with the Eleventh Circuit's statutory construction and selective use of legislative history.

With the exception of the Eleventh Circuit, no circuit court of appeals has found a school district liable for peer sexual harassment. In a qualified immunity case, the Ninth Circuit assumed *arguendo* that title IX applies to peer harassment but granted immunity because the law was not clear at the time of the incident. *See Doe v. petaluma City Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1994) (denying relief on qualified immunity grounds but noting that under current law qualified immunity would not protect a school official from liability in a peer sexual harassment claim)

Another circuit assumed *arguendo* that sexual harassment by a third party is actionable under title IX, but denied relief on alternative grounds. *See Murray v. New York Univ. college of Dentistry*, 57 F.3d 243 (2d Cir. 1995) (finding no liability when patient harassed a dental student because the university did not have sufficient notice of the harassment). The analysis in *Murray*, however, is not persuasive, as the case should be properly understood as an employment suit: First, the court analyzed the case as an employment case. Second, the unique nature of dental and medical schools makes its students quasi-employees. *See Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988) (applying title VII standards to a peer harassment case in a medical school because medical students should be viewed as employees).

than the grant recipient or its agents.[9]

The linchpin of Rowinsky's theory is the assumption that a grant recipient[10] need not engage in prohibited conduct to violate title IX. The specific statutory phrase at issue is the prohibition that "[n]o person be subjected to discrimination under any educational program or activities." Rowinsky focuses solely upon that phrase and argues that "under" means "in" and not "by." By making this substitution, she reasons that the statute cannot be limited to acts of discrimination by grant recipients.[11]

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[9] The dissent, perhaps recognizing the weakness of Rowinsky's argument, circumvents this issue by claiming that a student is an agent of the grant recipient. *See* Dissent at 20 (citing *Vernonia Sch. Dist. 47J v. Acton*, 115 S.Ct. 2386 (1995)). The dissent's approach is novel and, in our view, erroneous.

Acton and its predecessor, *New Jersey v. T.L.Q.*, 469 U.S. 325 (1985), stand for the proposition that the Constitution does not preclude a public school's having the power to discipline and control students who are in its care. Recognizing that a school has the power to discipline a student is a far cry from making the student an agent of the school. *Johnson v. Dallas Indep. Ech. Dist.*, 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995), also lends no support to the dissent's theory. Even if, *arguendo*, there were an obligation to protect students from foreseeably dangerous harm, such a duty would not transform the relationship between school and student into an agency relationship. *See also Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc) (no duty to protect student, attending voluntarily, from third party non-state actors).

[10] For purposes of this opinion, we refer to both the grant recipient and its agents as grant recipients.

[11] The second step in Rowinsky's argument is to interpret the word "discrimination" to include hostile environment sexual harassment. See *Davis*, 74 F.3d at 1193 ("Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompass-

es a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.") (footnote and citations omitted). We believe, however, that importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic.

At a theoretical level, the problem with sexual harassment is "the unwanted imposition of sexual requirements in the context of unequal power." Catherine MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979). In an employment context, the actions of a co-worker sometimes may be imputed to an employer through a theory of respondeat superior.

In an educational setting, the power relationship is the one between the educational institution and the student. *See* Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 533-36 (1987). In the context of two students, however, there is no power relationship, and a theory of respondeat superior has no precedential or logical support. Unwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker. This is not to say that the behavior does not harm the victim, but only that the analogy is missing a key ingredient--a power relationship between the harasser and the victim.

Even the dissent recognizes that employer liability for acts of non-supervisors is predicated on some theory of agency. *See* Dissent at 10-11 & n.7 ("As explained in *Meritor*, . . . an employer's liability for 'hostile environment' sex discrimination generally is based on the employer's failure to take reasonable corrective measures after receiving knowledge that an employee is being subjected to sexual harassment or abuse in the work environment by coworkers or non-employees over whom the employer has a degree of control or legal responsibility.")

Title VII cases (cited by Rowinsky) that have found liability for harassment by third parties are inapplicable, because in those cases the power of the employer was implicated. *See Sparks v. Regional Medical Ctr. Bd.*, 792 F. Supp. 735, 738 n.1 (N.D. Ala. 1992) (holding medical center responsible for sexual harassment of employee by independent-contractor physician); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) (blackjack dealer harassed by customers); *Magnuson v. Peak Technical Servs.*, 808 F. Supp. 500 (E.D. Va. 1992) (automobile

A.

As with any statute, our starting point in determining the scope of title IX is the statutory language. *Bailey v. United States*, 116 5. Ct. 501, 504 (1995); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Rowinsky's interpretation of title IX relies on isolating the prohibition against discrimination and recognizing that the statutory phrase does not, on its own, limit title IX to the acts of grant recipients. Determining the plain meaning of a statutory word or phrase, however, is only the starting point in statutory construction. "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" *Bailey*, 116 S. Ct. at 506. Thus, even if, *arguendo*, "under" means "in," this does not fully answer the interpretive question; we must look to the remainder of the statute to see whether there are any limits on "who" is prohibited from discriminating against students "in" an educational program.

We begin by noting that the text of title IX does not

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supplier's representative harassed by dealership manager)

The dissent's reliance on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) for the inference that sexual harassment by students may be attributed to the school board is also misplaced. *See* Dissent at 12, 18. First, sexual harassment by a teacher falls within the framework of *Meritor* because a teacher is an employee of the grant recipient. Thus, like the normal sexual harassment case, it is an agent of the defendant who is guilty of the harassment. Second, any language in *Franklin* regarding teacher-student sexual harassment is pure *dictum*; the district court dismissed, and the Eleventh circuit affirmed dismissal under FED. R. CIV. P. 12(b) (6), based solely on the ground that compensatory relief was unavailable for violations of title IX. *See Franklin v. Gwinnett County Pub. Sch.*, 911 F.2d 617, 618 (11th Cir. 1990), *rev'd*, 503 U.S. 60 (1992).

provide an unambiguous answer to the question. The title contains three general prohibitions: No person shall be excluded from participation in a program, denied the benefits of a program, or subjected to discrimination under a program. As is the case with the prohibition on. discrimination, each of the other prohibitions, taken in isolation, is not explicitly limited to the acts of grant recipients.

Take, for example, the first prohibition. It reads as follows: No person ... shall ... be excluded from participation in ... any educational program." Like the prohibition on discrimination, this proscription could encompass the acts of third parties.

On the other hand, the open-ended language of title IX does not support an inference that the statute applies to the conduct of third parties. Title IX was drafted in a way that identifies a benefited class in order to imply a private right of action.[12] Congress did not simply prohibit grant recipients from engaging in certain conduct, because to do so would be inconsistent with creating justiciable rights for its beneficiaries. Thus, the language of title IX is driven not by the desire to leave the class of wrongdoers undefined, but by the nature of the right protected.[13]

Despite the ambiguity in the text, three factors weigh in favor of interpreting title IX to impose liability only for the

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[12] *Cannon*, 441 U.S. at 690-91 ("There would be far less reason to infer a private remedy in favor of individual persons if congress, instead of drafting title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.").

[13] *Id.* at 693 n.13 ("Put somewhat differently, because the right to be free of discrimination is a 'personal' one, a statute conferring such a right will almost have to be phrased in terms of the persons benefited.").

acts of grant recipients. The first is the scope and structure of the title itself; the second is the legislative history; the third is agency interpretations of the statute.

B.

The fact that title IX was enacted pursuant to Congress's spending power is evidence that it prohibits discriminatory acts only by grant recipients. As an exercise of Congress's spending power,[14] title IX makes funds available

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[14] Although the Supreme Court has reserved the issue of whether title IX was enacted under the Spending Clause rather than § 5 of the Fourteenth Amendment, precedent strongly suggests that title IX, like its model, title VI, was enacted under the former. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99 (1983) (White, J.). In *Guardians*, at least five Justices held that title VI was enacted pursuant to the Spending Clause. *See id.* at 598-99 (White, J.), *id.* at 636-38 (Stevens, J. dissenting). Title IX was modeled after title VI and uses identical language, giving rise to an inference that title IX also was enacted pursuant to the Spending Clause.

An additional reason for interpreting title IX as a statute authorized by Congress's spending power is that the statute regulates purely private academic institutions. While the receipt of state funding may transform a private school into a state actor for Fourteenth Amendment purposes, the receipt of *federal* funds does not make a private school a *state* actor. Thus, any attempt to impose title IX liability on a private educational institution that receives no state funds would push the limits of the Fourteenth Amendment.

Finally, the Court has been cautious about attributing Congressional intent to act under its authority to enforce the Fourteenth Amendment, "[b]ecause such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority." *Pennhurst State Ech. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981). Nothing in title IX demonstrates an intent to enforce the Fourteenth Amendment, and its language and structure demonstrate that it is a spending statute. "Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States." *Id.* at 18.

to a recipient in return for the recipient's adherence to the conditions of the grant. While it is plausible that the condition imposed could encompass ending discriminatory behavior by third parties, the more probable inference is that the condition prohibits certain behavior by the grant recipients themselves.

This is so because the value of a spending condition is that it will induce the grant recipient to comply with the requirement in order to get the needed funds. In order for the coercion to be effective, the likelihood of violating the prohibition cannot be too great. This is especially true when the spending Condition also includes an implied right of action.

Imposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of title IX.[15] Thus, the possibility of a violation would be so great that recipients would be induced to turn down the grants. We find it unlikely that Congress would impose conditions on federal funds that would render the funds so unattractive to potential recipients, because to do so would render the conditions almost useless.

The structure of title IX supports the conclusion that

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[15] Take, for example, a situation in which the parents of a female student discourage her from studying and taking advantage of opportunities at school because they believe that a woman should not concentrate on an education. If the school had knowledge of the parents' interference and did nothing to stop it, Rowinsky's logic would make the school liable under title IX. The argument would proceed as follows: The girl is being subjected to discrimination because the parents are treating her differently from boys; the girl is being denied the full benefits of the educational program because of the discrimination; and the school has done nothing to stop the discrimination.

the spending conditions apply only to the conduct of grant recipients. With the exception of the one phrase upon which Rowinsky relies, the statute discusses discrimination by grant recipients. For example, numerous provisions exempt certain entities from coverage.[16] Other provisions exempt certain practices.[17] The statute's emphasis on grant recipients supports a conclusion that the statute applies only to the practices of the recipients themselves.

C.

The legislative history of title IX also supports limiting the statute to the practices of grant recipients. The Supreme Court has repeatedly stated that the purpose of title IX is to prevent discrimination by grant recipients. In *Cannon*, the Court reviewed the legislative history of title IX and concluded that

> title IX, like its model title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First Congress wanted to avoid the use of federal resources to support *discriminatory practices*; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.

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[16] *See, e.g.*, § 1681 (a) (3) (exempting religious institutions if title IX is inconsistent with the religious tenets of the organization); § 1681 (a) (5) (exempting traditional single-sex colleges); § 1681 (a) (7) (exempting Boys State and Girls State programs).

[17] *See* § 1681 (a) (9) (beauty pageants)

441 U.S. at 704 (emphasis added).[18]

Throughout the legislative history, both supporters and opponents of the amendment focused exclusively on acts by the grant recipients. Senator Bayh introduced the amendment and listed the types of sex discrimination, *all by grant recipients*, that prompted the legislation. 118 Cong.Rec. at 5803 (1972) ("It is clear to me that sex discrimination reaches into all facets of education-admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."). The senator described the "heart" of the amendment as "a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions." *Id.*[19]

Numerous other statements support the conclusion that title IX targets only acts by the grant recipients. Senator Bayh discussed the general prohibition against sex discrimination:

Central to my amendment are sections 1001-1-

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[18] *See also Grove City College v. Bell*, 465 U.S. 555, 577 (1983) (Powell, J., concurring) ("The sole purpose of the statute is to make unlawful *'discrimination'* by recipients of federal assistance programs."); *id.* at 585 (Brennan, J., concurring) ("As explained by its sponsor, the [precursor] amendment [to title IX] would have prohibited sex discrimination 'by any public institution of higher education or any institution of graduate education receiving Federal educational financial assistance.'").

[19] Although the statements of one legislator made during debate may not be controlling, Senator Bayh's remarks, coming from the sponsor of the language ultimately enacted, have been treated as authoritative to the statute's construction. *See North Haven*, 464 U.S. at 526-27. *See also Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (holding that statements by legislative sponsor "deserv[e] to be accorded substantial weight").

> 005, which would prohibit discrimination on the basis of sex in federally funded education programs . . . .
>
> This portion of the amendment covers discrimination in all areas where abuse has been mentioned--employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth.

118 Cong.Rec. at 5807. In a colloquy with Senator Pell, Senator Bayh stated:

> As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

Id. at 5812.

The drafters of title IX recognized that it was not a panacea for all types of sex discrimination, but rather a limited initial attempt to end discrimination by educational institutions. Again, Senator Bayh recognized that

> [w]hile the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs -- an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their

choice with equal pay for equal work.

Id. at 5808.

Further evidence that title IX was not intended as a cure for all types of discrimination comes from the fact that the original amendment mandated a study of sex discrimination in order to suggest further legislative remedies. *Id.* at 5803. Such a requirement--and the recognition that further legislation might be necessary--would be superfluous under Rowinsky's interpretation of title IX.

D.

The OCR's interpretation of title IX is consistent with refusing to impose liability for the acts of third parties.[20] The primary interpretation of title IX is found in its implementing regulations. *See* 34 C.F.R. § 106.31. The entire section is devoted to acts by the recipients themselves.[21]

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[20] When interpreting title IX, we accord the OCR's interpretations appreciable deference. *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). The deference accorded interpretive regulations depends on such factors as the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise. *Board of Educ. v. Harris*, 622 F.2d 599, 613 (2d Cir. 1979) (citing *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)), *cert. denied*, 449 U.S. 1124 (1981). Legislative regulations are accorded more than mere deference or weight. *Id.*

[21] Both Rowinsky and some district courts take the language of the implementing regulations out of context to support extending title IX to peer harassment. *See Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1289 (N.D. Cal. 1993) ("The implementing regulations of title IX forbid any sex-based limitation 'in the enjoyment of any rights, privilege, advantage or opportunity' related to federally funded education."). But, like any statute or regulation, the specific prohibition in 34 C.F.R. § 106.31(b)(7) must be read in context. The entire regulation is as follows:

(b) *Specific prohibitions.* Except as provided in this

The most definitive statement by the OCR on sexual harassment focuses on conduct by employees or agents of the recipient. The OCR's Policy Memorandum contains the following definition:

> Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient*, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX.

OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981) (emphasis added). In particular, the agency left unresolved the issue of peer sexual harassment. *Id.* at 10 ("The other unresolved issue relates to a recipient's responsibility for the sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other students.").[22]

> subpart, in providing any aid, benefit, or service to a student, *a recipient shall not*, on the basis of sex:
>
> . . .
>
> (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

Read in context, the regulation prohibits *recipients* from limiting the rights, privileges, advantages or opportunities of students. The regulation cannot reasonably be read to include the actions of third parties.

[22] It is no coincidence that the OCR leaves the issue of peer harassment unresolved. The OCR's source of jurisdiction over sexual harassment is 34 C.F.R. 3106.31(b). OCR Policy Memorandum at 1. As we have discussed, *see supra* note 19, § 3106.31(b) prohibits discrimination by grant recipients. Sexual harassment by third parties is beyond the jurisdiction of the OCR unless the power of the school district is somehow

The only OCR documents to apply title IX to peer sexual harassment, i.e., recent Letters of Finding, should be accorded little weight. Any weight the letters do have are outweighed by both the implementing regulations and the Policy Memorandum promulgated by the OCR. As a legislative regulation, the implementing regulations found at 59 C.F.R. § 106 are accorded far greater deference than are interpretive regulations such as Letters of Finding. *Harris*, 622 F.2d at 613. The Policy Memorandum deserves more deference because it represents a deliberate policy statement by the agency and is consistent with past agency interpretations. *See id.*

Even standing alone, the Letters of Finding should be accorded very little deference, because none of the traditional factors supporting deference are present. The letters are promulgated during investigations of specific institutions, and their purpose is to compel voluntary compliance by an offending institution. *See Doe v. Fetaluma City Sch. Dist.*, 54 F.3d 1447, 1456 (9th Cir. 1995). Because of the pressures to settle in an investigation, the circumstances surrounding their promulgation are significant. *Accord Harris*, 622 F.2d at 613. In addition, the OCR has only recently treated complaints of peer harassment as within its jurisdiction. *Id.* Finally, the letters do not reflect the deliberate consideration of a rulemaking proceeding. *Id.*

The only agency interpretation to support Rowinsky's position involves title VI. The OCR considers peer hostile environment racial harassment a violation of title VI. 59 Fed. Reg. 11448, 11449 (1994). Nothing in the regulations or commentary explains why title VI applies to the acts of non-recipients. The only analysis the OCR makes is to cite title VII cases for the proposition that a hostile environment

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implicated by the third party.

can be discrimination. *Id.* at 11451. Absent a reasoned explanation for why the statutory language supports applying title VI to peer harassment, the OCR's interpretation should not be accorded any deference.

IV.

This case was decided by the district court on motion for summary judgment. On the question of whether there was a genuine issue of material fact as required by FED. R. CIV. P. 56, we conclude that under the legal standard articulated by the district court, and affirmed by this court, the plaintiff has failed to allege or provide evidence that supports a cause of action under title IX.

The mere existence of sexual harassment does not necessarily constitute sexual discrimination. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982), *adopted in Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Barnes v. Castle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). Both men and women can be the victims or perpetrators of sexual harassment. Schneider, *supra* note 9, at 531 n.30. For example, this circuit has recognized that same-sex sexual harassment is not always sex discrimination under title VII.[23] In the same vein, sexual overtures directed at both sexes, or behavior equally offensive to both males and females, is not

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[23] *See Blake v. City of Laredo*, No. 95-40060 (5th Cir. June 9, 1995) (per curiam) (unpublished) (holding that male-on-male sexual harassment does not state title VII claim); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994) (holding that male-on-male sexual harassment is not sex discrimination); *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (per curiam) (unpublished) (holding that male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex). *But see Sardinia v. Dellwood Foods*, 64 U.S.L.W. 2329 (S.D.N.Y. Nov. 1, 1995); EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1604.11(b) (1986).

sex discrimination. *See Henson*, 682 F.2d at 904.

In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys. As the district court correctly pointed out, however, Rowinsky failed to allege facts to support such a claim. The judgment is AFFIRMED.

DENNIS, Circuit Judge, dissenting.

This case presents the question whether the plaintiffs, "Jane Doe" and "Janet Doe," eighth grade students in a school system receiving federal funds, may maintain a federal court action under Title IX of the Educational Amendments, 20 U.S.C. § 1681, for monetary damages, a declaratory judgment and injunctive relief against the school board. The plaintiffs alleged and showed that the board failed to take appropriate corrective action after it received knowledge of the plaintiffs' sexual harassment by male students that created for the plaintiffs a hostile educational environment. The district court granted the school board's motion for summary judgment, holding that Jane and Janet Doe had failed to state a claim because they did not allege or show that the board discriminated against them by affording male students greater protection from sexual abuse than females. The majority of this panel affirms, holding similarly, that "[i]n the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys." Slip op. at 19-20. Because I believe that the plaintiffs have stated valid claims for the relief requested under Title IX, and are entitled to proceed to trial thereon,[1]

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[1] In reaching this conclusion, I am in agreement with the only other circuit court to squarely address this issue. *See Davis v. Monroe County Board of Education*, 74 F.3d 1186 (11th Cir. 1996) (holding that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment."); *see also Bosley v. Kearney R-1 School District*, 904 F.Supp. 1006 (W.D.Mo. 1995) (recognizing Title IX cause of action against school board for peer sexual

I respectfully dissent.[2]

I.

In reviewing the district court's grant of summary judgment, this court applies the *same* standard of review as the district court. *Garcia v. Elf Atochern North America,* 28 F.3d 446, 449 (5th Cir. 1994), *Jurgens v. E.E.O.C.,* 903 F.2d 386, 388 (5th Cir. 1990). The pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, must demonstrate there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Under this standard, factual findings and inferences are considered with deference to the nonmovant. *Garcia,* 28 F.3d at 449.

The facts emerging from the pleadings and motion for summary judgment filings are set forth in detail in the majority opinion. There can be no doubt that these facts, viewed in the light most favorable to the plaintiffs for purposes of our summary judgment review, demonstrate that the school board knowingly failed to take appropriate steps to protect Jane and Janet Doe from sexual harassment, abuse and discrimination by male students that was sufficiently severe or pervasive as to create a hostile and abusive educational environment for the plaintiffs. Neither the district court nor the majority express disagreement with this conclusion. Their decisions rather are that as a matter of law female students do not have a right of action under Title IX against any educational institution receiving federal funds on the ground that the institution has knowingly allowed male students to create

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abuse where the school board intentionally fails to take proper remedial action).

[2] I join in the opinion only to the extent that it finds that Mrs. Rowinsky, the mother of Jane and Janet Doe, individually lacks standing under Title IX.

a hostile educational environment by sexual harassment of those students.

II.

Title IX of the Education Amendments Act of 1972 prohibits sex discrimination in any educational program or activity receiving federal financial assistance:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

20 U.S.C. § 1681(a). It is undisputed that at the time of the sexual harassment and abuse of the plaintiffs the school board was an educational program receiving federal financial assistance.

Supreme Court precedent interpreting the scope of Title IX establishes that the statute creates a broad federal protection privately enforceable by beneficiaries of the act. In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), the Supreme Court held that Title IX is enforceable through an implied right of action by certain classes of private parties. The Court applied the four factors set forth in *Cort v. Ash,* 422 U.S. 66, 78 (1975) for analyzing whether a private right of action is to be implied under a federal statute: (1) is the plaintiff one of the class for whose especial benefit the statute was enacted? (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? and (4) is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? The Court concluded that notwith-

standing Title IX's failure to expressly authorize a private right of action, a woman who, because of her sex, is denied admission to an education program of an institution which receives federal financial assistance may maintain a federal action for violation of Title IX, since a woman who is discriminated against on the basis of sex is a member of the class for whose especial benefit Title IX was enacted; the legislative history indicates Congress' intent to create a private cause of action for a person excluded, on the basis of sex, from participation in a federally funded program; implication of a private remedy under Title IX is fully consistent with the orderly enforcement of Title IX; and the subject matter of private action under Title IX (invidious sex discrimination) does not involve an area basically of concern to the States. Having determined that private remedies are available under Title IX, the Court ended its analysis and refrained from addressing the specific types of private remedies available. *Id.* at 709, 717.

More recently, in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60 (1992), the Supreme Court addressed the issue of remedies and held that the implied private right of action under Title IX includes a right to a claim for money damages. In *Franklin,* the plaintiff, a female high school student, filed suit under Title IX against a county school board receiving federal funds, alleging that she had been subjected to continual sexual harassment and abuse by a teacher and that, although administrators and other teachers became aware of and investigated the teacher's sexual harassment of her and other female students, no action was taken to halt the abuse and she was discouraged from pressing charges against the teacher. The district court dismissed the complaint on the ground that Title IX does not authorize an award of damages. The court of appeals affirmed. *Franklin v. Gwinnett County Public Schools,* 911 F.2d 617 (11th Cir.

1990), *rev'd by* 503 U.S. 60 (1992).

The Supreme Court reversed, basing its holding that a damages remedy is available for an action brought to enforce Title IX primarily on the longstanding general rule that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. *Franklin,* 503 U.S. at 66-68 (citing, *inter alia, Bell v. Hood,* 327 U.S. 678 (1946)).[3]

In examining Title IX to determine whether Congress had limited the remedies available, the Court observed that because the *Cannon* Court inferred a cause of action upon concluding that Title IX provided no express right of action, the silence of the pre-Cannon statutory text and legislative

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[3] The Court rejected an argument that the rule had disappeared in succeeding decades, citing several instances of its adherence to the traditional "any available relief" presumption. Discussing *Guardians Assn. v. Civil Service Comm 'n of New York City,* 463 U.S. 582 (1983), the Court observed that "[t]hough the multiple opinions in Guardians suggest the difficulty of inferring the common ground among the Justices in that case, a clear majority expressed the view that damages were available under Title VI [the closely analogous model for Title IX] in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action.") *Franklin,* 503 U.S. at 70. The Court also acknowledged that in *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984), it had held that the 1978 amendment to § 504 of the Rehabilitation Act of 1973--which had expressly incorporated the "remedies, procedures, and rights set forth in title VI" (29 U.S.C. § 794a(a) (2))--authorizes an award of backpay. *Franklin,* 503 U.S. at 70. It is worth noting that in *Daronne,* the Court unanimously observed that a majority in *Guardians* had "agreed that retroactive relief is available to private plaintiffs for all discrimination, *whether intentional or unintentional,* that is actionable under Title VI." 465 U.S. at 630 n.9 (emphasis added).

history on the issue of available remedies is neither surprising nor enlightening. Rather, the appropriate inquiry for the pre-*Cannon* period is the state of the law when Congress passed Title IX. Because, at that time, the traditional presumption in favor of all available remedies was firmly established, and the Court, in the decade prior to Title IX's enactment, had found implied rights of action in six cases and approved a damages remedy in three of them, the Court concluded that the lack of any legislative intent to abandon the traditional presumption was amply demonstrated. For the post-*Cannon* period, when Congress was legislating with full Cognizance of that decision, the Court's analysis of the text and history of the two statutes enacted to amend Title IX--the Civil Rights Remedies Equalization Amendment of 1986 and the Civil Rights Restoration Act of 1987--established that Congress validated *Cannon's* holding and made no effort to alter the traditional presumption. *See Franklin,* 503 U.S. at 1035-37.

In unanimously upholding the plaintiff's private cause of action,[4] moreover, the Franklin Court necessarily must have concluded that under the *Cannon-Ash v. Cort* analysis high school students whom the school board knowingly allows to be subjected to sexual harassment and abuse deleteriously affecting their educational environment are persons who have been discriminated against on the basis of sex and are therefore members of the class for whose especial

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[4] The holding that Title IX implies a right of action for damages by a female student for "hostile environment" sexual harassment was unanimous. In a separate concurring opinion, Justice Scalia, joined by the Chief Justice and Justice Thomas, agreed with the Court's disposition of the case, observing that [b]ecause of legislation enacted subsequent to Cannon, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate." *Franklin,* 503 U.S. at 1939 (Scalia, J., concurring).

benefit Title IX was enacted, for whom Congress intended to create a private cause of action, for whom implication of a private remedy under Title IX is fully consistent with its orderly enforcement, and that the subject matter of their private action under Title IX does not involve an area basically of concern to the states.

Most important to the case at bar, however, the *Franklin* Court interpreted Title IX as placing on the school board a duty not to discriminate on the basis of sex, by knowingly failing to take appropriate corrective action when a male teacher has sexually harassed and abused a female high school student and thereby created for her a hostile educational environment. The Court elaborated on this subject in rejecting the argument by the board and the government that the Court should not apply the traditional presumption in favor of appropriate relief because Title IX was enacted pursuant to Congress's Spending Clause power.[5] The Court explained:

> In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an uninten-

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[5] Although the Court noted Franklin's argument that Title IX also rests on powers derived from § 5 of the Fourteenth amendment, the Court found it unnecessary to decide which power Congress utilized because it had concluded that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute. *See Franklin*, 503 U.S. at 75 n.8.

> tional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *See id.* at 17, 67 L.Ed. 2d 694, 101 5. Ct. 1531. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 64, 91 L.Ed.2d 49, 106 5. Ct. 2399 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional violations it sought to proscribe.

Franklin, 503 U.S. at 75. (Underscoring supplied; italics in original).

Accordingly, the Supreme Court in *Franklin* not only recognized a right to money damages as a remedy available under a private right of action based on an intentional violation of Title IX; the Court also acknowledged that an educational institution receiving federal funds intentionally violates Title IX and engages in sex discrimination against which the statute affords protection when it knowingly fails to take reasonable steps within its power to prevent the sexual harassment or abuse of a student by a teacher that is so severe or pervasive that it creates a hostile and harmful school atmosphere for that student. By citing *Meritor Savings Bank,* in which the Court held that a claim of "hostile environment" sex discrimination is actionable under Title VII, as analogous

precedent for its interpretation of Title IX, the Court indicated that standards similar to those applied or adverted to in *Meritor* are appropriate criteria for determining when there has been a violation of Title IX giving rise to a claim of "hostile environment" sex discrimination.[6]

As explained in *Meritor*, as well as antecedent cases and EEOC Guidelines discussed therein, an employer's liability for "hostile environment" sex discrimination generally is based on the employer's failure to take reasonable corrective measures after receiving knowledge that an employee is being subjected to sexual harassment or abuse in the work environment by co-workers (or non-employees over whom the employer has a degree of control or legal responsibility). In other words, employer liability for hostile environment harassment by coworkers and non-employees under Title VII is predicated on the *employer's failure* to act in accordance with its statutory duty not to discriminate in the workplace on the basis of "race, color, religion, sex or national origin" with respect to its "terms, conditions, or privileges of employ-

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[6] The High Court's acknowledgment in *Franklin* that a school employee's sexual abuse of students is "unquestionably" sex discrimination prohibited by Title IX, moreover, demonstrates that, under the statute's broad directive, the term "discrimination" is not limited to the situations, such as admissions, scholarships, hiring and promotions, that appear to have been the focus of the congressional debates on the Educational Amendments. *See* slip Op. at pp. 13-15] (discussing legislative history). Rather, a student is "excluded from participation in, [] denied the benefits of or subjected to discrimination under," 20 U.S.C. § 1681, a federally funded program when she is sexually abused by an employee of that program. Further, in finding that a school district can be liable under Title IX for the unauthorized acts of its agents, the Court established that a federally funded program may be liable for conduct extending beyond the practices, policies and decisionmaking directly attributable to it, even though Title IX's language is not expressly directed to conduct of the program's agents or others.

ment," 42 U.S.C. § 200e-2(a)(1), by requiring an employee to work in an environment permeated with "discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . ."[7] *Harris v.*

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[7] In *Meritor,* the Court held that the court of appeals had erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. The Court observed, however, that under agency principles absence of notice to the employer will not necessarily insulate it from liability for a supervisor's sexual harassment. 477 U.S. at 69-73. The present case does not require that we address the issue of vicarious liability by the school board because the plaintiffs here have alleged and shown that the school board was itself negligent because it had knowledge of the sexual harassment and failed to take appropriate corrective measures.

The majority states on page 9, footnote 11, of its opinion that my acknowledgement that an employer is liable for its knowing failure to take reasonable steps to correct co-worker or non-employee harassment "recognizes that employer liability for the acts of non-supervisors is predicated on some theory of agency," and that my reliance on *Franklin* is misplaced here because in that case the sexual harassment by a teacher fell within the *Meritor* framework because a teacher is an agent of the school board. The majority thus suggests that under agency principles, employer liability is necessarily based on some form of vicarious liability. It is certainly recognized under agency principles that a principal may be vicariously liable for the acts of agents under certain circumstances. Nonetheless, agency law also recognizes that direct liability is imposed on principals for *their tortious* conduct. See, e.g. *id.* § 219(2) (master is liable for torts of servants acting outside the scope of their employment if "(a) the master intended the conduct or consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master . . ."). The fact that the law of agency incorporates principles of tort liability thus does not detract from the recognition that in the context of hostile environment harassment by non-supervisors, an employer's liability is not vicarious, but is directly predicated on its own negligent conduct in breaching a duty to act imposed by Title VII. *See* RESTATEMENT 2D OF TORTS § 284 (b) (negligent conduct includes

Forklift Systems, Inc., ___ U.S. __, 114 5. Ct. 367, 370 (1993) (quoting *Meritor,* 477 U.S. at 65, 67). Consequently, the *Franklin* Court's recognition of this type of claim under Title IX necessarily indicates that a student subjected to severe sexual harassment by other students in the school environment may recover for damages sustained thereby from a federally funded educational institution if its board had knowledge of the harassment and failed to take appropriate corrective action.

In *Meritor,* the Supreme Court addressed for the first time a number of issues relating to Title VII hostile environment sexual harassment claims. Although the case involved a female bank employee who was allegedly subjected to sexual harassment by her male supervisor, and therefore did not directly address sexual harassment by nonsupervisory employees or non-employees, some of the principles enunciated by the Court apply generally to all cases in which discrimination based on sex creates a hostile or abusive work environment. The Court held that unwelcome sexual advances that create an offensive or hostile working environment

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"a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do); *see also Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464-65 (7th Cir. 1990) (discussion of employer liability for co-worker sexual harassment). As Judge Posner explains in *Guess*, the use of the term "respondeat superior" to describe employer liability in this context is a misnomer. Rather the "knew or should have known" standard imposes

> a negligence standard that closely resembles the 'fellow servant rule' [under which] the employer, provided it has used due care in hiring the offending employee in the first place, is liable for that employee's torts against a coworker only if, knowing or having reason to know of the misconduct, the employer unreasonably fails to take appropriate corrective action.

Id. at 465.

may violate Title VII, and that when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex. This proposition was not challenged by any party in the case. It is implicit in the Court's opinion and explicit in authorities it cited with approval that the same principle applies to sexual harassment by co-workers and even strangers to the workplace: When a nonsupervisory employee or non-employee sexually harasses an employee, that co-worker or non-employee likewise discriminates on the basis of sex.

The *Meritor* Court noted that in 1980 the EEOC issued Guidelines specifying that sexual harassment, as there defined, is a form of sex discrimination prohibited by Title VII; and that as an administrative interpretation of the Act by the enforcing agency, these Guidelines, while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. In defining "sexual harassment," the Court observed, the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII, including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, 29 C.F.R. § 1604.11(a) (1985), and provide that such sexual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. § 1604.-11(a)(3). The Court found it significant that, in concluding that so called "hostile environment" (i.e., non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in

an environment free from discriminatory intimidation, ridicule, and insult. *See Meritor*, 477 U.S. at 65-67 (citing, *inter alia*, 45 Fed. Reg. 74676 (1980); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982)). In *Henson*, the Court of Appeals had observed that "[t]he environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace. The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual." *Id.* at 910 (citations omitted).

Although the Court in *Meritor* expressly addressed only the subject of sexual harassment by a supervisor of a subordinate, the Court's heavy reliance on and approval of the EEOC guidelines, as well as the general principles it announced, strongly imply also the Court's approval of the EEOC Guidelines regarding sexual harassment by non-supervisory co-workers and non-employees. Those Guidelines, in pertinent part, provide:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. § 1604.11(d)
>
> An employer may also be responsible for acts of non-employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appro-

> priate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.
>
> § 1604.11(e)

The rule expressed by the Guidelines pertaining to sexual harassment by non-supervisory co-workers has been uniformly applied by the courts. It is not a controversial area; results in each case simply depend on an interpretation of the facts: whether the employer had sufficient notice, investigated properly, disciplined offenders, and so forth. See 3 Larson, Employment Discrimination §46.07 [4] [a] (2d ed. 1995) and authorities cited therein.[8] The rule pertaining to non-employ-

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[8] The Guidelines did not introduce this liability standard into the Title VII context. Prior to the EEOC's enactment of the Guidelines, lower courts had recognized that an employer may be liable under Title VII if it knowingly failed to remedy a discriminatory work atmosphere caused by the acts of co-workers. *See, e.g. DeGrace v. Rumsfeld,* 614 F.2d 796, 803-05 (1st Cir. 1980) (employer may be liable for allowing racial harassment by coworkers); *Higgens v. Gates Rubber Co.*, 578 F.2d 281, 283 (10th Cir. 1978) (Title VII violation requires showing that employer was aware or should have been aware of discriminatory work environment), *E.E.O.C. v. Murphy Motor Freight Lines, Inc.*, 488 F.Supp. 381, 386 (D.Minn. 1980) ("If management knows or should know of incidents of racial harassment that are more than sporadic, it has a responsibility to take reasonable affirmative steps to eliminate such incidents".); *Friend v. Leidinger,* 446 F.Supp. 361, 383-84 (E.D.Va. 1977) ("Only if the employer knows or should have known of the condition and permits it to continue without attempting to discourage it, may it be found liable."), *judgment aff'd,* 588 F.2d 61 (4th Cir. 1978); *Bell v. St. Regis Paper Co., Container Division,* 425 F.Supp. 1126, 1137 (N.D.Ohio 1976) (employer may be liable for acts of harassment by employees "merely by condoning them.").

ees, while involving fewer cases, appears equally uncontroversial. *Id.* § 46.07[4][b]

In summing up the post-EEOC Guidelines jurisprudence, the Court in *Meritor* stated:

> Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F.2d 897, 902 (1982):
>
> > "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Meritor, 477 U.S. at 66 (additional authorities omitted). By the same token, the Court in *Franklin* evidently recognized that sexual harassment which creates a hostile or offensive educational environment for members of one sex is every bit the arbitrary barrier to sexual equality in the educational environment that racial harassment is to racial equality. Surely, a requirement that a male or female junior high school student run a gauntlet of sexual abuse in return for the privilege of receiving an education can be as demeaning and disconcerting as the harshest of racial epithets. Indeed, although the Supreme Court has not yet been presented with a "goose" case, it is difficult to imagine that it would not

conclude that the knowing failure to curb student on student sexual harassment is actionable after holding that a knowing failure to eliminate teacher-student sexual harassment is grounds for a Title IX damage suit.

The Supreme Court was not entirely clear, however, about what it meant in *Franklin* when it said that "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *See [Pennhurst State School and Hospital v. Halderinan,* 451 U.S.] at 17, 101 S. Ct. 1531. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged." *Franklin,* 503 U.S. at 75. The trouble is that the passage in *Pennhurst* cited by the Court does not speak expressly in terms of "unintentional violations" or "intentional discrimination." In *Pennhurst,* the Court was presented with the issue of whether Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. § 6010) created in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment. After concluding that the Act was enacted solely pursuant to the Spending Clause, the Court reasoned:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on wheth-

> er the State *voluntarily* and *knowingly* accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) (emphasis added)

Because *Franklin* itself clearly holds that Title IX satisfies the *Pennhurst* notice requirement in placing a duty on school boards to counteract known hostile environment sexual harassment of students, so that the school board voluntarily and knowingly accepted the terms of the "contract," and that a board's failure to perform its duty is an "intentional" violation of Title IX, it is difficult to decipher exactly what the Court meant by the *Pennhurst* passage. Perhaps the *Franklin* Court's discussion of *Pennhurst* was only intended to put Congress and other concerned parties on notice that statutes which do not speak as clearly as Title IX in proclaiming that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" might not be construed so as to afford a private right of action for their enforcement. Alternatively, the Court's expression may have been intended to limit the right of action under Title IX based on hostile environment sexual harassment claims to the situation in which the federal funds recipient has actual knowledge, or perhaps constructive notice

(which is its legal equivalent), and fails to take appropriate corrective action, rather than in every situation in which the recipient "should have known," in the ordinary negligence sense, of the sexual harassment.

In any event, it is clear from the plaintiffs' allegations and filings in opposition to the motion for summary judgment that they have stated a claim under Title IX because the facts adduced, viewed most favorably to them, show that the school board had actual knowledge that the plaintiffs were being subjected to sexual harassment and abuse sufficiently severe and pervasive as to create for them a hostile and offensive educational environment, and that the board failed to take appropriate corrective action. Indeed, it would appear that the school board in the case at bar was given as much, if not more, knowledge and notice of the ongoing sexual harassment of the plaintiffs as was given the school board in the *Franklin* case. When a male student or even a stranger sexually harasses a female student within the school environment under the board's control, he discriminates on the basis of sex just as much as did the teacher in the *Franklin* case. Although the Court did not spell out the analogy to *Meritor* fully by stating that the school board's failure to take corrective action after gaining actual knowledge of the sexual harassment, this meaning is implicit from the Court's citation of *Meritor*. The Supreme Court reversed the court of appeals' affirmance of the district court's dismissal of Franklin's complaint and remanded the case for further proceedings. This court should therefore reverse the district court's summary judgment against the plaintiffs and remand this case for trial or further proceedings.

Apparently underlying the majority's conclusion that summary judgment is appropriate here is the incorrect assumption that, in general, school boards have no duty with respect to students' safety and no power of discipline to

control educationally pernicious student conduct. *See* slip. op. at 12-13. Even if the school board had not accepted federal funds, however, it owes a much higher duty to its students and has far greater powers of control over them than that described in the majority opinion. In *Vernonia School District 47J v. Acton*, ___ U.S. ___, 115 5. Ct. 2386 (1995), the Supreme Court held that a school board may require all participants in high school athletic programs to submit to urinanalysis tests for drugs regardless of whether any grounds existed to suspect a particular athlete. As partial justification for granting the board this much disciplinary power over students, the court concluded that while the state does not owe a student the same constitutional duty of protection that it owes a prisoner in its full time custody, the student is nevertheless within the temporary custody of the state while in public school and the state also has a tutelary duty to promote and inculcate good morals, health and self discipline among its students.[9] The Court observed that its earlier decision in *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985)

> did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.

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[9] For reasons that are certainly inscrutable to me, the majority interprets my advertance to *Acton* to constitute the "novel" and "erroneous" suggestion that a student is an agent of the school in order to fit within the majority's conflation of agency and tort principles. *See infra at 11-12, n. 9.* As should be clear from the discussion of *Acton* in the text of my dissent, I have referred to that case merely to point out that the Supreme Court has recognized that schools maintain a degree of control over school children and that in this context such control is sufficient to apply tort liability for the knowing failure of a school receiving federal funds to act in accordance with its statutory duty to prevent sex discrimination in the school.

> "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." . . . While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a *constitutional* "duty to protect," . . . we have acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," . . . with the power and indeed the duty to "inculcate the habits and manners of civility," . . . Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," . . . the nature of those rights is what is appropriate for children in schools.

Id., 115 S. Ct. at 2392 (emphasis added). *See also Johnson V. Dallas Independent School Dist.*, 38 F.3d 198, 208 n. 7 (5th Cir. 1994) ("Schools . . . take care of children day after day for years *in public facilities.* Schools may be said to control children's environments to the same or even greater degree than state-sponsored foster care services, which have been held, post-*DeShaney*, to bear affirmative obligations to their client children. * * * That parents yield so much of their children's care into the hands of public school officials may well be argued to place upon the officials an obligation to protect students at least from certain kinds of foreseeably dangerous harm during regular school hours."), *cert. denied*, ___ U.S. ___, 115 5. Ct. 1361 (1995).

For all of the foregoing reasons, I cannot agree with my colleagues that the school board's dereliction amounts to nothing more serious in law than the situation in which a bystander witnesses the drowning of a complete stranger.

Unquestionably, because the school board has accepted federal financial assistance, Title IX places upon it a duty to take appropriate measures to protect students from being subjected in the school environment to sexual harassment, abuse and discrimination of which the board has actual knowledge. As Jane and Janet Doe presented evidence sufficient to survive summary judgment that the school board failed to do so here, the district court's judgment should be vacated and the case remanded for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEBRA ROWINSKY, for herself and as next friend of "JANE DOE" and "JANET DOE," her minor children, and for all those similarly situated,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-93-3578
BRYAN INDEPENDENT SCHOOL DISTRICT, SARAH ASHBURN, Superintendent of Bryan ISD, RANDY CAPERTON, Vice-Principal of Sam Rayburn Middle School, SANDRA PETTY, former Vice-Principal of Rayburn Middle School, JAY ANDING, Assistant Director of Transportation, and BOB OWENS, bus driver, and their employees, agents, and all those acting in concert with them or at their direction,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending is the Motion for Summary Judgment of Defendant Bryan Independent School District: ("BISD"), and

Defendants Sarah Ashburn, Sandra Petty, Randy Caperton, Jay Anding, and Bob Owens ("the Individual Defendants") (Document No. 44).[1] After having considered the summary judgment evidence, arguments, and authorities submitted by counsel, as well as the Amicus Brief submitted by the Texas Association of School Boards, *et al.*, the Court is of the opinion that Defendants' Motion for Summary Judgment should be GRANTED.

I. Background

Plaintiff Debra Rowinsky brings this action for herself and as next friend, on behalf of her minor daughters, "Jane Doe" and "Janet Doe," asserting that Janet was sexually harassed at Sam Rayburn Middle School ("the School"), a public school owned and operated by BISD, and that Jane and Janet also were sexually harassed by other school children while riding the BISD school bus to the School. Plaintiffs have produced competent summary judgment evidence demonstrating the following:

Beginning in September 1992, a male student, G.S., physically and verbally abused Jane and Janet on the bus. Bob owens, the bus driver, did not immediately respond to the girls' complaints, but later assured Mrs. Rowinsky that he would put a stop to the behavior. On September 24, 1992, however, while riding the bus G.S. grabbed Jane in her genital area, and, a few minutes later, grabbed her breasts. Upon informing Randy Caperton, the Vice-Principal of the

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[1] Also pending are the Motion for Leave to File Briefs in Excess of the Court's Page Limit of Defendant BISD (Document No. 43), the Motion for Leave to File Brief as Amici Curiae of the Texas Association of School Boards, *et al.* (Document No. 55), and the Motion for Leave to File Amicus Brief Exceeding Twenty Pages of the Texas Association of School Boards, *et al.* (Document No. 56).
These three motions are GRANTED.

School, of this misconduct, Caperton suspended G.S. from riding the bus for three days and required G.S. to sit on the front seat thereafter. Despite this action, during a period of time in late November, 1992, G.S., with Owens nearby, called the girls offensive names and slapped Janet's buttocks. The girls did not complain to Owens about this misbehavior.

On the afternoon of December 16, 1992, another male student on the bus, L.H., reached up Jane's skirt, touched her near her panty line, and then made a crude remark about what he almost touched. Jane did not tell Owens about this incident. In "December 1992," L.H. reached up Janet's skirt, made the same comment, and then actually grabbed her genital area. Janet told Owens of this misconduct, but he "just stared into space." As a result of this misbehavior, L.H. was suspended for three days. L.H. is not alleged to have further harassed or abused the girls.

On December 18, 1992, Jay Anding, the Assistant Director of Transportation for BISD, assured Mrs. Rowinsky that he would investigate the alleged problems on the bus and take action, On January 14, 1993, after reviewing videotapes from the bus, Anding's assistant, C.W. Henry, assigned a new driver to the bus. G.S. is not alleged to have further harassed or abused the girls.

On March 30, 1993, during a class at the School, a third male student, F.F., reached under Janet's shirt and unfastened her bra. The teacher in the classroom sent both students to Vice-Principal Sandra Petty's office. Ms. Petty sent Janet back to class and suspended F.F. for the rest of the day and the next day. F.F. is not alleged to have further harassed or abused the girls.

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution, and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) and implementing regulations (34 C.

F.R. § 106). As noted in this Court's Order entered March 31, 1994, Plaintiffs' claims under § 1983 are properly made against the individual Defendants only in their individual capacities. Plaintiffs' claims against the individual Defendants under Title IX have been dismissed.

II. Discussion

A. The Summary Judgment Standard

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Willis v. Roche Biomedical Lab., Inc., 21 F.3d 1368, 1371 (5th Cir. 1994).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. Celotex, 106 S. Ct. at 2553-54. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15 (1986). Unsubstantiated or conclusory assertions that a fact issue

exists will not suffice. *See* Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993); Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." Krim, 989 F.2d at 1442.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. Kelley v. Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 688 (1994), citing Matsushita, 106 S. Ct. at 1351. On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." Id., *citing* Anderson, 106 S. Ct. at 2511.

B. Plaintiffs' § 1983 Substantive Due Process Claim

An individual may bring suit against a person who, under color of state law, has deprived him of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. Plaintiffs allege that Defendants' insufficient action in response to Jane's and Janet's complaints of sexual harassment by the boys facilitated continuing abuse, thus depriving the girls of their substantive due process right to bodily integrity. While it is undisputed that the alleged harassers were private actors, Plaintiffs further assert that BISD and its officials owed a duty to protect the girls as a result of a "special relationship"

created by the Texas compulsory education laws.[2] Defendants' Motion for Summary Judgment contends that the Defendants owed Jane and Janet no affirmative constitutional duty to protect them from harassment from other students, that the individual Defendants are entitled to qualified immunity, and that Plaintiffs have failed to raise so much as a fact issue indicating that the Defendants were deliberately indifferent to the girls' constitutional rights.

In general, "a state's failure to protect an individual from private violence simply does not constitute a violation of the Due Process Clause." DeShaney v. Winnebago County Dept. of Social Services, 109 S. Ct. 998, 1004 (1989). An affirmative obligation of care and protection can arise, however, when the state "takes a person into its custody and holds him there against his will." Id. at 1005-06. Thus, inmates in prisons are in a "special relationship" with prison officials and are owed that duty of care and protection. Every circuit Court of Appeals to consider the application of that rule to a case such as this, however, has rejected the argument that compulsory day school attendance laws create a "special relationship" that gives rise to an affirmative obligation to protect a student from a private actor's conduct. *See* D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1369-73 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993); J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990); Dorothy J. v. Little Rock School Dist., 7 F.3d 729, 732 (8th Cir. 1992); Maldonado v. Josey, 975 F.2d 727, 730-33 (10th

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[2] With a few exceptions (most notably for children attending private or parochial school), Texas law mandates that children between the ages of six and seventeen attend the public school in the district of their residence. Tex. Educ. Code Ann. §§ 21.032-33 (Vernon 1987 & Supp. 1994).

Cir. 1992), *cert. denied*, 113 S. Ct. 1266 (1993). The Honorable Norman Black, Chief Judge of this Court, also has held that no such "special relationship" exists between Texas public school officials and students who return to their homes each day. Esmeralda v. Partin, 864 F. Supp. 626 (S.D. Tex. 1994).

The Fifth Circuit at least on two occasions has found it unnecessary to decide whether a "special relationship" exists by reason of Texas's compulsory school law. Johnson v. Dallas Ind. School Dist., 38 F.3d 198, 203 & n.7 (5th Cir. 1994); Leffall v. Dallas Ind. School Dist., 28 F.3d 521, 529 (5th Cir. 1994). The Court has noted, however, that the "argument against holding that public schools have 'custody,' at least for some purposes of protecting their physical well-being, appears to derive less from logic than from a pragmatic desire to limit their legal liability." Johnson, 38 F.3d at 203 n.7. The author of the Johnson opinion, Judge Edith H. Jones, ended the referenced footnote, however, with a reiteration of her own "reticence to expand the scope of constitutional claims." Id.

This Court is bound to respect the circuit caselaw. The uniform holdings of four circuit courts and the prior holding of this Court, by its Chief Judge, are controlling. Moreover, the respected views of Judge Jones for the Fifth Circuit suggest that even if a different analysis is made, the likelihood of expanding the scope of constitutional claims to embrace claims of the nature of this case, even when viewing the evidence in the light most favorable to Plaintiffs, is most improbable.[3] After all, the *rejected* claim in Johnson arose

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[3] The summary judgment proof in this case -- largely of adolescent school kids engaging in vulgar and indecent conduct while riding the school bus, and a possibility that the District, which did punish the offenders, meted out insufficient punishment to deter further juvenile

out of the murder of a school child by a non-student, who carried a concealed handgun, rode on the school bus, and entered the school without a student ID badge, where he then shot a student in the head with a stray bullet. In this case, to be sure, the boys' alleged conduct in sexually harassing the girls on the school bus, if true, was vulgar and thoroughly reprehensible. But at least no life was lost or threatened, and all else rather pales when contrasted with the enormous tragedy that occurred in Johnson. The Court therefore concludes that there is no "special relationship" giving rise to a duty of constitutional dimensions that Defendants in this case must protect the girls from the boys' sexual harassment. Moreover, even if the compulsory school laws do create a "special relationship" for the purpose of protecting the children's well-being in certain limited circumstances, under the summary judgment evidence here, viewed in the light most favorable to Plaintiffs, no fact issue has been raised on the assertion that Defendants in this case violated Plaintiffs' constitutional rights. The individual Defendants have also correctly contended that in any event they are entitled to judgment based on their qualified immunity. Harlow v. Fitzgerald, 102 S. Ct. 2727, 2738 (1982). The great weight of authority has held that public school students do not have a constitutional right to be protected from private actors, as observed above. No contrary rule for the public day school setting has been adopted by the Fifth Circuit. It therefore would be objectively unreasonable to conclude that in not

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misconduct of the same sort -- is simply insufficient to implicate "the 'fundamental rights implicit in the concept of ordered liberty' and 'deeply rooted in this nation's history and tradition' under the Due Process Clause." Doe v. Taylor Ind. School Dist., 15 F.3d 443 (5th Cir. 1994), *quoting* Griffith v. Johnston, 899 F.2d 1427, 1435 (5th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

protecting Jane and Janet from sexual harassment by other students, the individual Defendants (in 1992-93) knew or should have known that they were violating the girls' clearly established constitutional rights. *See* Doe v. Taylor Ind. School Dist., 15 F.3d 443, 455 (5th Cir. 1994) (constitutional right clearly established only if apparent in pre-existing law). *See also* Spivey v. Elliott, 29 F.3d 1522, 1527 (11th Cir. 1994) ("The right must be particularized so that potential defendants are on notice that conduct in violation of that right is unlawful.").[4]

C. Plaintiffs' Title IX Claim

Plaintiffs also allege that BISD discriminated against Jane and Janet on account of their sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which provides:

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[4] Furthermore, Plaintiffs' cite no Texas law or School rule *requiring* the use of BISD-provided transportation. Thus, even if the compulsory day school law under certain circumstances created a "special relationship," the *absence* of any legal compulsion requiring students to ride the school bus would likewise suggest the absence of any "special relationship" when one voluntarily chose that means of transportation. *See* Black by Black v. Indiana Area School Dist., 985 F.2d 707, 714 (3d Cir. 1991) ("Neither the state compulsory attendance law nor any other state rule required [plaintiffs'] presence on the [] school bus."). *See also* Leffall, 28 F.3d 521 (no special relationship because no state compulsion for student to attend after-school dance).

Under this analysis, the case involves only one alleged act of sexual harassment on the school premises, namely, F.F.'s unfastening of Janet's bra. F.F.'s misconduct was punished with a one and one-half day suspension and F.F. is not alleged to have harmed Janet again. Because the misconduct was punished, evidently to good effect, Plaintiffs' have not so much as raised a fact issue that Defendants were deliberately indifferent to Janet's constitutional rights--a material element of Plaintiffs' cause of action. *See* Gonzalez v. Ysleta Ind. School Dist., 996 F.2d 745, 760 (5th Cir. 1993).

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Defendants' Motion for Summary Judgment contends that Plaintiffs have failed to raise so much as a fact issue that BISD intentionally discriminated on the basis of sex.

To recover damages, Plaintiffs must establish that BISD "intentionally discriminated against the plaintiff student[s] on the basis of sex." Doe v. Petaluma City School Dist., 830 F. Supp. 1560, 1576 (N.D. Cal. 1993). It is not enough that BISD knew or should have known about sexual harassment at the School or did not effectively deal with such complaints. Id.

Plaintiffs assert that BISD failed to respond effectively to claims of sexual harassment *because* of a District policy of intentional sex discrimination. No proof has been offered that BISD's School Board ever adopted any resolution or took any other action formally to adopt or implement such a policy. Plaintiffs instead support their claim by pointing to the following: (1) while the BISD policy handbook describes expulsion or special off-campus placement as proper punishment for students who assault others, neither G.S. nor L.H. nor F.F. were expelled or given special off-campus placement for their alleged assaults on Jane and Janet; (2) G.S. continued to harass the girls after serving his suspension; (3) BISD had a practice or policy of punishing sexual misconduct less severely than fighting;[5] and (4) BISD failed to adhere to federal government regulations under Title IX,

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[5] The summary judgment evidence indicates that students who fought were typically given at-home suspensions, while those who engaged in sexual misconduct were given in-school suspensions.

and failed to train its personnel properly to respond to claims of sexual harassment.

As for the first claim, while the BISD policy handbook does describe expulsion or special off-campus placement as proper punishment for students who assault others, the summary judgment evidence includes over 100 examples of boys and girls who fought or otherwise assaulted other boys and girls, but, like the boys accused of assaulting Jane and Janet, were not expelled or given special off-campus placement. In other words, whatever disparities may have existed in the policy for punishment of different kinds of offenses, or in the applications of those policies, the uncontroverted summary judgment fails to establish a fact issue that any distinction was made by the District based on the sex of the victims.

Second, while G.S.'s misconduct is alleged to have resumed after his suspension, Jane admits in her affidavit that the girls did not immediately inform the bus driver of this new misbehavior, and no allegation is made that G.S. harassed either of the girls after BISD, when it received new complaints, assigned a new driver to the bus. Furthermore, there is no allegation or summary judgment evidence in the record that L.H. or F.F., after they were punished, harmed Jane or Janet again.

Third, the summary judgment evidence indicates that, unlike fighting, much of the reported incidents of student misbehavior identified as "sexual misconduct" involved no physical contact (e.g., namecalling, indecent language, distributing indecent pictures), or only minor physical contact (e.g., poking, flicking, swatting). Plaintiffs do not contend and the summary judgment evidence does not demonstrate that similar conduct was treated dissimilarly based on the victim's sex. In fact, two of the boys accused of abusing Jane and Janet were punished much like students who fought-

-with short at-home suspensions accompanied by parental notification.

Fourth, any failure to train BISD personnel properly to respond to allegations of sexual harassment or failure properly to create or administer Title IX grievance procedures would harm all victims of such harassment, male and female, and thus raises no fact issue on the claim of intentional discrimination based on sex. *See* Seamons v. Snow, 864 F. Supp. 1111, 1117 (D. Utah 1994) ("Defendants' failure to adopt a [sex discrimination] policy or designate coordinators affects males and females equally, and therefore as a matter of law cannot show an intent to discriminate on the basis of sex.").

Finally, what Plaintiffs have not alleged or shown in the summary judgment evidence is any proof that the District dealt less severely with sexual harassment and misconduct directed toward girls than it did with sexual harassment and misconduct directed toward boys.

Accordingly, the Court concludes that the summary judgment evidence, viewed in the light most favorable to Plaintiffs, fails to raise a fact issue that BISD discriminated against Jane and Janet on account of their sex. There is simply no evidence of any intentional sex discrimination by BISD.

D. Plaintiffs' § 1983 Equal Protection and Procedural Due Process Claims

Plaintiffs also assert claims against Defendants under § 1983 for depriving them of their "right to due process by failing to adhere to the specific procedural safeguards provided by the [federal statute].'" Additionally, Plaintiffs seek redress under § 1983 on the claim that "Defendants' actions and/or inactions discriminated against Jane and Janet Doe on the basis of sex, and deprived them of their right to equal protection, as guaranteed by the Fourteenth Amendment

to the United States Constitution." Defendants respond in their Motion that both claims are subsumed by Plaintiffs' Title IX claim.

Indeed, when "the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewage Authority v. Nat'l Sea Clammers Assoc., 101 S. Ct. 2615, 2626 (1981). An examination of Title IX reveals a comprehensive scheme for administrative and regulatory enforcement of its requirements, together with judicial review. *See* 20 U.S.C, §§ 1682, 1683. Moreover, and most significantly, the Supreme Court has held that victims of discrimination are entitled under Title IX to bring private causes of action for prohibited discrimination. Cannon v. University of Chicago, 99 S. Ct. 1946 (1979). This private remedy for individual victims of Title IX violations is implied in the statute, held the Court, "[n]ot only [by] the words and history of Title IX, but also [by] its subject matter and underlying purposes . . . ." Id. at 1964.[6] Moreover, one bringing a private right of action for enforcement of Title IX also has a damages remedy available. Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992). Accordingly, in view of the comprehensive enforcement scheme of Title IX, Plaintiffs' Title IX related equal protection and procedural due process claims are subsumed by the Act, and therefore may not separately be maintained as claims under § 1983.

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[6] The Court also held that there is no inconsistency between this private remedy and the public remedy of enforcement by the Department of Health, Education, and Welfare. In fact, observed the Court, HEW had taken the "unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes," a position that the Court held was "unquestionably correct." Cannon, 99 S. Ct. at 1962-63.

See Williams v. School Dist. of Bethlehem, Pa., 998 F.2d 168, 176 (3d Cir. 1993) *cert. denied*, 114 S. Ct. 689 (1993); Mabry v. State Bd. for Community Colleges, 597 F. Supp. 1235, 1239 (D. Colo. 1984), *aff'd on other grounds*, 813 F.2d 311 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 148 (1987); Ruh v. Samerjan, 816 F. Supp. 1326, 1331-32 (E.D. Wis. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994).

Moreover, BISD is only obligated under the Title IX federal regulations to hear complaints alleging actions prohibited by Title IX.[7] Title IX does not prohibit student-on-student sexual harassment because "[t]he sexually harassing behavior of a fellow [student] is not part of a school program or activity." Aurelia D. v. Monroe County Bd. of Education, 862 F. Supp. 363, 367 (M.D. Ga. 1994). While Petaluma, 830 F. Supp. at 1576 & n.14, indicates that Title IX prohibits a school district from failing to respond effectively to claims of sexual harassment in order to discriminate against girls, Plaintiffs have not so much as raised a fact issue on this claim.[8] Therefore, even if Plaintiffs were permitted to assert under § 1983 their denial of due process and equal protection claims premised on BISD's alleged failure to have complied with Title IX's procedural regulations, Plaintiffs have failed in their summary judgment proof to demonstrate any injury to themselves resulting from such failure, and therefore have no claim for damages. *See* Reimer v. Smith, 663 F.2d 1316, 1322 n.4 (5th Cir. 1981) ("It is axiomatic that a plaintiff cannot succeed in

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[7] *See* 34 C.F.R. § 106.8(b) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.").

[8] Nor do Plaintiffs claim that this is the grievance that BISD denied them access to assert.

a § 1983 action if he fails to demonstrate a causal connection between the state official's alleged wrongful action and his deprivation of life, liberty, or property.").[9]

[9] While Plaintiffs also pray for injunctive relief, Plaintiffs have not pled facts or submitted summary judgment evidence demonstrating any possible future injury to Plaintiffs. To the contrary, it is undisputed that Jane and Janet no longer attend school in BISD. *See* O'Shea v. Littleton, 94 S. Ct. 669, 676 (1974) (past exposure to illegal conduct does not in itself warrant injunctive relief if unaccompanied by continuing, present, adverse effects).

APPENDIX C

[TITLE IX OF EDUCATION AMENDMENTS OF 1972]
UNITED STATES CODE ANNOTATED
TITLE 20. EDUCATION
CHAPTER 38--DISCRIMINATION BASED
ON SEX OR BLINDNESS

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except. . . .

CODE OF FEDERAL REGULATIONS
TITLE 34--EDUCATION
SUBTITLE B--REGULATIONS OF THE OFFICES OF
THE DEPARTMENT OF EDUCATION
CHAPTER I--OFFICE FOR CIVIL RIGHTS,
DEPARTMENT OF EDUCATION
PART 106--NONDISCRIMINATION ON THE BASIS OF
SEX IN EDUCATION PROGRAMS AND ACTIVITIES
RECEIVING OR BENEFITING FROM FEDERAL
FINANCIAL ASSISTANCE
SUBPART A--INTRODUCTION

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

§ 106.9 Dissemination of policy.

(a) Notification of policy.

(1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto. . . .

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers;

(ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) Publications.

(1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each

announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

No. 95-_____

96-4

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DEBRA ROWINSKY, for herself and as next friend of "JANE DOE" and "JANET DOE," her minor children, and for all those similarly situated,

Petitioner,

—v.—

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NOW LEGAL DEFENSE AND EDUCATION FUND NATIONAL WOMEN'S LAW CENTER (Additional *Amici* Listed on Inside Cover) IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are organizations strongly committed to achieving equality for women, each with an abiding interest in ensuring the sound interpretation and application of the provisions contained in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 ("Title IX") that protect students against sexual harassment in schools. Descriptions of the individual organizations are set forth in the attached appendix.[1]

REASONS FOR GRANTING THE PETITION

In a decision that subverts Title IX's important purpose of "provid[ing] women with solid legal protection as they seek education and training for later careers," Cannon v. University of Chicago, 441 U.S. 677, 704 n.36 (1979), the court below effectively immunized educational institutions from liability for failing to remedy a hostile environment for students created by persistent and egregious sexual harassment inflicted by other students. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996). By permitting peer sexual harassment claims only when a plaintiff proves that the school responded to sexual harassment claims differently based on sex, id. at 1016, the ruling sharply conflicts both with other circuit court precedents with respect to the standard under which schools will be held liable for peer sexual harassment, and with the standard for proving intentional discrimination and recovering monetary damages for such claims under Title IX. Moreover, the decision below misconstrues this

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[1] The parties' written consent to the filing of this brief have been filed with the Court.

Court's precedents establishing standards for assessing sexual harassment claims, raising important issues regarding Title IX's promise of equal educational opportunity.

I. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS AND CLARIFY TITLE IX'S APPLICATION TO HOSTILE ENVIRONMENT SEXUAL HARASSMENT AMONG STUDENTS

A. The Fifth Circuit Decision Conflicts with Decisions in Other Circuits and Adds to the Confusion in the Lower Courts

In 1992, this Court held that Title IX permits an award of monetary damages for intentional discrimination based on sex. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74-75 (1992). Specifically, it held that when a teacher sexually harasses a student, the school[2] discriminates on the basis of sex in violation of Title IX and may be subject to liability for compensatory damages. Id. In the wake of Franklin, courts have agreed that Title IX prohibits both quid pro quo and hostile environment teacher-student harassment and have applied agency principles used in analyzing Title VII of the Civil Rights Act of 1964 ("Title VII") claims of supervisor harassment to assess schools' liability for the harassment.[3]

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[2] As used in this brief, the term "school" denotes only those educational institutions receiving federal financial assistance and thus subject to Title IX's prohibitions.

[3] See, e.g., Bolon v. Rolla Pub. Schs., 1996 U.S. Dist. LEXIS 2778 (E.D. Mo.), appeal granted, 1996 U.S. Dist. LEXIS 2776 (E.D. Mo. 1996); Oona R.-S v. Santa Rosa City Schs., 890 F. Supp. 1452, 1467 n.13 (N.D. Cal. 1995); Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp.

Since Franklin, however, courts have divided over whether an educational institution is liable for failing to remedy hostile environment peer sexual harassment about which it knew or should have known. The Rowinsky decision reflects the two principal conflicts among courts addressing peer sexual harassment claims after Franklin: (1) whether the Title IX requirement that schools maintain a nondiscriminatory environment for students includes a duty to respond to and remedy a hostile environment created by students; and (2) whether Franklin's standard for intentional discrimination in Title IX damages claims imposes a requirement that plaintiffs alleging peer sexual harassment present additional proof of discriminatory intent or motive on the part of the school.

1. Courts Are Divided Over Whether Title IX Imposes a Duty to Remedy Hostile Environment Peer Sexual Harassment of Which Schools Knew or Should Have Known

The first question -- whether Title IX imposes an obligation on schools to take prompt and appropriate corrective action to stop hostile environment peer sexual harassment -- has divided federal circuit courts. In Davis v. Monroe County Board of Education, 74 F.3d 1186, 1194-95 (11th Cir. 1996), the first appellate court to address this issue held that an educational institution may be found in noncompliance with Title IX for failing to respond adequately to sexual harassment carried out by students if it had actual or constructive knowledge of the harassment.

In that case, the Eleventh Circuit Court of Appeals adapted and applied the five-part test commonly used in

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1288, 1290-91 (N.D. Cal. 1993).

analyzing claims under Title VII for a hostile environment created by a co-worker in an employment context. Under Davis, a school is liable for a sexually hostile environment created by a fellow student if: (1) the victim is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment experienced was based on sex; (4) the harassment affected the conditions of her education; and (5) the school knew or should have known of the harassment and failed to take "prompt remedial action." Id. (citing Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982)).

Borrowing from the employment context, the Davis court reasoned that the first four elements establish a prima facie case of intentional sex discrimination, while the fifth establishes the basis for holding the school liable for that discrimination. 74 F.3d at 1194. Concluding that co-worker harassment under Title VII is analogous to peer harassment under Title IX, the court applied the well-established Title VII rule to conclude that a school may be liable for failing to respond properly to a student-created hostile environment of which it knew or should have known.

Several other circuit courts, while not directly addressing the issue, have aligned themselves with the Davis court in applying Franklin to such peer sexual harassment cases. These courts have assumed that, like Title VII, Title IX requires schools to respond appropriately to known hostile environment harassment by students or other third parties. See Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248-50 (2d Cir. 1995) (discussing Title VII standards in analyzing Title IX sexual harassment claim); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995) (applying Title VII principles to Title IX hostile environment sexual harassment

claim), cert. denied, 116 S. Ct. 1044 (1996); cf. Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1402 (9th Cir. 1994) ("school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment"). See also Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995) (denying defendant school's motion for summary judgment because school may be liable for peer sexual harassment); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1576 (N.D. Cal. 1993) (noting that schools may be liable for failing to remedy hostile environments created by peer harassment of which they knew or should have known).

In direct conflict with Davis, the Rowinsky court reached the opposite conclusion, i.e., that a school is not liable for failing to address peer sexual harassment properly unless its response to the harassment treats male and female harassment victims differently. 80 F.3d at 1025. Rejecting the universally applied standard holding employers liable for sexual harassment by non-agents about which it "knew or should have known,"[4] the Rowinsky court concluded that there must be an act of discrimination by the school itself -- beyond condoning the sexual harassment by students -- in order to sustain a school's liability for peer sexual harassment. Accordingly, the court dismissed the eighth-grade students' claims that their school's persistent failure to take steps to stop other students' repeated sexual assaults, touching and harassment violated Title IX. See also Brzonkala v. Virginia Polytechnic & State Univ., No. 95-1358-R at 12 (W.D. Va. May 7, 1996) (refusing to hold

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[4] See, e.g., Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 (10th Cir. 1990); Hall v. Allis-Chalmers Corp., 797 F.2d 1417, 1421-22 (7th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); see also infra nn. 7, 8.

school liable for peer sexual assault because plaintiff presented no evidence that school's response indicated anti-female bias) (copy of decision lodged separately with the Court); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) (dismissing hostile environment Title IX claim against school because allegations that school knowingly failed to take appropriate corrective action would not be enough to state a Title IX claim).

The absence of guidance from this Court concerning schools' liability for peer sexual harassment has led to mixed results in other circuits as well. For example, in Seamons v. Snow, 1996 WL 233483 (May 8, 1996), the Tenth Circuit Court of Appeals simultaneously applied incongruous elements of the Davis and Rowinsky approaches to reach a thoroughly confusing result. The Seamons court nominally adopted the five-part test delineated in Davis; however it interpreted the requirement that the conduct be based on sex to apply to the school's response rather than to the underlying harassment. 1996 WL 233483 at *11-*12. Imposing this requirement, the court refused to hold the school liable for its ineffective response to an incident in which a high school male was sexually harassed by his peers because, according to the court, nothing the school did was "sexual" or "based on sex." Id. at *12. Thus, while citing Davis, the Seamons court apparently adopted the analytical framework applied in Rowinsky. Similarly inconsistent decisions inevitably will result absent this Court's guidance.

2. Courts Also Disagree Over the Meaning of "Intentional Discrimination" in Peer Sexual Harassment Cases

The decision below contributes to a split in the circuits over the type of proof required to show "intentional discrimination" under Franklin. In Franklin, this Court explained that damages are available under Title IX for intentional discrimination. 503 U.S. at 74-75. Courts considering peer sexual harassment cases have adopted two divergent approaches to interpreting this term.

According to one line of cases, typified by the Eleventh Circuit's opinion in Davis, a school's failure to respond to complaints of hostile environment harassment by students establishes liability for damages under Title IX. Davis, 74 F.3d at 793; accord Rowinsky, 80 F.3d at 1025 (Dennis, J., dissenting); see also Murray, 57 F.3d at 248-49 (presuming that damages could be awarded under Title IX if school had notice of harassment by a non-agent third party but failed to remedy the situation, regardless of the school's discriminatory intent or motive); Bosley, 904 F. Supp. at 1022 (finding intentional discrimination from evidence that school knowingly failed to take appropriate remedial action despite notice of the unwelcome harassment); Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1469 (N.D. Cal. 1995) (finding evidence of intentional discrimination in school officials' refusal to take action to address peer sexual harassment complaints).

This approach correctly recognizes that proof of hostile environment sexual harassment establishes intentional discrimination because sexual harassment is facially disparate treatment and therefore always is a form of intentional discrimination. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990)

(stating that the intentional nature of sexual harassment "should be recognized as a matter of course"); Henson, 682 F.2d at 901-02 (recognizing sexual harassment as disparate treatment that "intentionally single[s] out" a woman because of her sex); Jones v. Kansas Army Ammunitions Plant, 147 F.R.D. 248, 252 (D. Kan. 1993) ("Federal laws prohibiting racial and sexual harassment are wholly uninterested in the perpetrator's intent. Victims need establish neither fault nor the discriminatory intent of their supervisors and/or co-workers."); see also International Union v. Johnson Controls, Inc., 499 U.S. 187, 199-200 (1991) (disparate treatment depends on the terms of the discrimination, not the motive behind it); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1258 (6th Cir. 1985) (holding that "an employer intends discrimination where he condones racial harassment of employees"), cert. denied, 475 U.S. 1015 (1986). This Court has treated sexual harassment as intentional discrimination by presuming that damages are available in sexual harassment cases brought under the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (1992), which like Franklin permits compensatory damages only in cases of intentional discrimination. See Landgraf v. USI Film Prods., 511 U.S. 244, 263-64 (1994).

Because Franklin's intentional discrimination requirement simply denotes disparate treatment as opposed to disparate impact or unintentional discrimination, a school that knowingly fails to correct a hostile environment created by students commits intentional discrimination and is liable for damages. See Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830 n.9 (4th Cir. 1994) (applying Franklin to a claim under section 504 of the Rehabilitation Act, to hold that intentional discrimination under Franklin simply denotes disparate treatment and "does not establish a higher burden of proof"); see also Alexander v. Choate, 469 U.S. 287, 293-94 (1985) (equating unintentional discrimination

with disparate impact and intentional discrimination with disparate treatment).

However, other court decisions, typified by Rowinsky, have misapprehended the meaning of intentional discrimination, requiring a plaintiff to prove subjective discriminatory motive on the part of a school in order to obtain damages for a school's knowing failure to respond to peer sexual harassment.[5] See Rowinsky, 80 F.3d at 1016; Seamons, 1996 WL 10699, at *12 (dismissing claim because plaintiff did not allege the school's acts were motivated by an intent to discriminate on the basis of sex); Brzonkala, No. 95-1358-R, at 7 (plaintiff must allege intentional discrimination and causal connection between the outcome and the bias; bias must be a motivating factor); Petaluma, 830 F. Supp. at 1576 (N.D. Cal. 1993) (holding that proof of a school's failure to respond appropriately to known peer harassment alone is insufficient to prove intentional discrimination although it would be circumstantial evidence of intent), motion for reconsideration of intent standard pending (argued April 26,

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[5] Not confined solely to the sexual harassment arena, the conflation of "intentional discrimination" with "evil motive" has been further exacerbated by a recent district court decision interpreting Franklin's intentional discrimination language in the context of a non-sexual harassment Title IX athletics case. In Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996), the court, misconstruing Franklin, refused to find that the school's actions in denying women equal athletic opportunity under Title IX were "intentional." Rather, the court excused the school's actions as based in "arrogant ignorance, confusion about the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change." Id. at 918-19. Such misapprehension of Franklin's language is strong evidence that this Court should grant certiorari and provide necessary guidance to lower courts.

1996, N.D. Cal.). This approach defies Franklin and well-established employment discrimination law.

B. The Decision Below Conflicts with Prior Decisions of this Court

Despite this Court's mandate to "give [Title IX] the scope its origins dictate [and to] accord it a sweep as broad as its language," North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982), the Rowinsky court imposed a limitation on Title IX that departs from the statute's language, its legislative history, and the line of cases interpreting it. This Court consistently has construed Title IX broadly to effectuate the statute's remedial purpose, notwithstanding the absence of explicit statutory language. See Franklin 503 U.S. at 74-75 (prohibiting sexual harassment); North Haven, 456 U.S. at 521, 530 (applying Title IX to cases of employment discrimination in education); Cannon, 441 U.S. at 677 (implying private cause of action). The Rowinsky court contradicts these holdings by relying on the absence of explicit statutory language to frustrate Title IX actions for a school's knowing failure to respond to peer sexual harassment. Rowinsky, 80 F.3d at 1011-13.

The court below further contravened this Court's precedents, which counsel courts to look to Title VII to define substantive discrimination under Title IX and related civil rights statutes. In Franklin, this Court correctly relied on Title VII authority and principles in analyzing sexual harassment under Title IX. 503 U.S. at 75.[6] This Court

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[6] Courts also apply Title VII standards as a matter of course in Title IX employment cases, which construe the same statutory language at issue in peer sexual harassment cases. See, e.g., Preston v. Commonwealth of Virginia, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII,

also has recognized that Title VII principles should define the contours of the antidiscrimination prohibition in Title VI of the Civil Rights Act of 1964 ("Title VI"), Title IX's legislative antecedent. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (concluding that although the language of Title VI is ambiguous, it is "surely subject to the construction given the antidiscrimination proscription of Title VII").

Nowhere in Title VII law does the proposition adopted by the Rowinsky court exist -- that employers are liable for sexual harassment only if they handle complaints by female employees differently than those by male employees due to the employer's subjective motive to discriminate. Had the court below applied Title VII standards in accordance with this Court's precedents, it inevitably would have concluded that educational institutions are liable for failing to respond to peer sexual harassment of which they knew or had reason to know. It is beyond cavil that an employer may be held liable for failing to remedy a hostile environment created by its supervisory or non-supervisory employees[7] or

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and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX"); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988) (applying Title VII to Title IX sexual harassment case because it is the "most appropriate analogue when defining Title IX's substantive standards") (quotations omitted); Mabry v. State Bd. of Community Colleges, 813 F.2d 311, 316 (10th Cir. 1987) (same); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360, 1366 n.2 (E.D. Pa. 1985) (finding Title VII standards "equally applicable" to Title IX in sexual harassment case), aff'd, 800 F.2d 1136 (3d Cir. 1986).

[7] See, e.g., Henson, 682 F.2d at 901-02; see also Fleenor v. Hewitt Soap Co., 81 F.3d 48, 49 (6th Cir. 1996); Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 & n.5 (10th Cir. 1990).

its customers[8] without any inquiry into the employer's discriminatory intent or motive. Under Title IX, an educational institution has the duty to provide its students with a non-discriminatory environment, just as Title VII mandates that an employer must provide such an environment for its workers. Cf. Franklin, 112 S. Ct. at 1037. See also Patricia H. v Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993) (recognizing that any "distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools"). By requiring a higher standard of liability for remedying peer sexual harassment in schools than is applied in the workplace, the Rowinsky decision creates sui generis a poorly-crafted standard that departs from both well-established sexual harassment law and Title IX precedents.

C. The Decision Below Would Undermine Enforcement of Title IX and Related Anti-discrimination Statutes

Requiring proof of a school's discriminatory motive in failing to correct a hostile environment undermines Title IX's promise of equal educational opportunity. If the decision below is allowed to stand, a school could escape liability for knowingly permitting a hostile environment to flourish unless the school responded differently to male and female victims of harassment or unless the plaintiff had proof of the school's subjective anti-female bias. Ironically, a school district maintaining a strict policy of equal tolerance for sexual harassment against boys and girls would be invulnerable to Title IX liability under Rowinsky.

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[8] See, e.g., Menchaca v. Rose Records, Inc., 67 Fair Empl. Prac. Cas. (BNA) 1334, 1336-67 (N.D. Ill. 1995); Otis v. Wyse, 1994 U.S. Dist. LEXIS 15172 at *17 (D. Kan. 1994); Sparks v. Regional Medical Ctr., 792 F. Supp. 735, 738 n.2, 746 (N.D. Ala. 1992).

The holding below similarly undermines Title IX's existing regulatory scheme, which requires recipients to ensure equity in their programs even when third parties cause the discrimination. See, e.g., 34 C.F.R. § 106.31(d) (1995) (holding recipients liable for discrimination in any educational program, even if the recipient does not itself commit the discriminatory act); 34 C.F.R. § 106.32(c) (1995) (requiring recipients to take reasonable action to ensure non-discrimination in housing opportunities even with respect to housing provided by third-parties).

The Rowinsky approach stands in stark contrast to the Department of Education's longstanding interpretation of Title IX.[9] The Department of Education's Office for Civil Rights ("OCR") consistently has construed Title IX to hold schools liable for their knowing failure to respond to sexual harassment perpetrated by students. See, e.g., Letter of Findings by Kenneth A. Mines, Regional Civil Rights Director, Region V (April 23, 1993), Docket No. 05-92-1174 (lodged with the Court under separate cover).

In addition, the decision below will undermine the enforcement of Title VI, which is Title IX's legislative

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[9] As the agency charged by Congress with responsibility for enforcing Title IX, the Department of Education's Office for Civil Rights ("OCR") has broad authority to regulate federally-funded educational programs or activities under the statute. Courts should "accord[] great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." North Haven, 456 U.S. at 522 n.12 (1982). Accordingly, courts frequently have deferred to OCR's Letters of Findings. See Petaluma, 830 F. Supp. at 1573; Patricia H., 830 F. Supp. at 1291 n.3; see also Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993); Garrett v. Board of Educ., 775 F. Supp. 1004, 1009-10 & n.9 (E.D. Mich. 1991).

antecedent, and Section 504 of the Rehabilitation Act, which mirrors Title IX. Regulatory schemes under both statutes hold recipients liable for failing to correct discriminatory conditions created by third parties. See 34 C.F.R. § 100.4(a)(2) (1995), 45 C.F.R. § 80.4(a)(2) (1995) (requiring recipient to ensure nondiscrimination by transferee of government's real property under Title VI); 34 C.F.R. § 104.11(a)(4) (1995), 45 C.F.R. § 84.11(a)(4) (1995) (prohibiting recipients from participating in contracts with employment agencies or labor unions if such participation effects any discrimination on those protected by § 504); 34 C.F.R. § 104.33(b)(3) (1995), 45 C.F.R. § 84.33(b)(3) (1995) (prohibiting placement of disabled students in schools or programs run by third-parties without ensuring that no discrimination prohibited by § 504 occurs); see also Miller v. Spicer, 822 F. Supp. 158, 164 (D. Del. 1993) (permitting liability against hospital under § 504 for non-employee doctor's discrimination against patient).

Finally, the decision below stands in stark contrast to OCR's interpretation of Title VI to prohibit racial harassment in schools. Contrary to Rowinsky, OCR's investigative guidance holds recipients liable for discriminatory conduct causing a racially hostile environment of which it knew or should have known, "regardless of the identity of the person(s) committing the harassment--a teacher, a student, the grounds crew, a cafeteria worker, neighborhood teenagers, a visiting baseball team, a guest speaker, parents, or others." Racial Incidents and Harassment at Educational Institutions, 59 Fed. Reg. 11,448, 11,450 (1994) (emphasis added); see also Township High Sch. Dist. No. 214, OCR Case No. 05-82-1097 (cited in Racial Incidents, 59 Fed. Reg. at 11,453) (Title VI violated where school failed to take adequate steps to correct repeated racial harassment by students, of which employees were aware); Defiance

College, OCR Case No. 05-90-2024 (cited in Racial Incidents, 59 Fed. Reg. at 11,451) (violation occurred where college was aware of repeated and patently offensive verbal and physical racial harassment committed by students).

II. THE COURT SHOULD GRANT THE PETITION TO FURTHER THE IMPORTANT NATIONAL INTEREST IN ENDING SEXUAL HARASSMENT IN EDUCATION

The Rowinsky decision conflicts with well-established public policy rationales, endorsed by many courts, that underscore the importance of recognizing and curbing peer sexual harassment in schools. Just as this Court has recognized the need for employers to stem the harm that results from sexual harassment at work, courts nationwide have recognized that strong measures are needed to curb the same, if not greater, harm caused by peer sexual harassment in schools.

This Court's most recent decision on sexual harassment acknowledged the need for prompt and immediate action to curb sexual harassment. As the Court stated, sexual harassment can create environments "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability" of affected workers. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993) (quotations omitted).[10]

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[10] The harmful effects of sexual harassment at work have been well documented. See, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1505, 1507, 1524-27 (M.D. Fla. 1991); Barbara A. Gutek & Mary T. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. of Vocational Beh. 28, 31-35 (1993); Sally J. Kaplan, Consequences of Sexual

Sexual harassment hurts schoolchildren even more than adult workers. As the Eleventh Circuit Court of Appeals recently recognized:

> The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.

Davis, 74 F.3d at 1193.

Similarly, the Ninth Circuit Court of Appeals recognized that "[g]iven the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools." Clyde K., 35 F.3d at 1401-02. Accord Oona R.-S., 890 F. Supp. at 1469; Bosley, 904 F. Supp. at 1020; Patricia H., 830 F. Supp. at 1292-93. Commentators agree that schools should take active steps to prevent and stop sexual harassment in order to avoid its attendant harms.[11]

Harassment in the Workplace, 6 Affilia 50, 53 (1991); Peggy Crull, Stress Effects of Sexual Harassment on the Job: Implications for Counseling, 52 Am. J. Orthopsychiatry 539, 541 (1982).

[11] See Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 551 (1987); Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271, 290-93 (1994).

Three recent national surveys exploring the frequency and severity of sexual harassment in schools,[12] as well as its adverse impact on students, confirm the wisdom of requiring schools to take steps to stop peer sexual harassment. They reveal that sexual harassment in schools, including peer sexual harassment, imposes serious educational, emotional, and physical consequences on students that operate as a barrier to full and equal participation in education. As a threshold matter, the surveys expose the prevalence of sexual harassment, most of which takes the form of hostile environment harassment. See Hostile Hallways at 7-8 (85% of girls have experienced sexual harassment, and of those girls, 65% were touched, grabbed, or pinched in a sexual way; and 66% experienced at least one form of harassment "often" or "occasionally"); Secrets in Public at 2 (83% of girls were touched, pinched or grabbed; and 39% of girls were sexually harassed at school on a daily basis in the last year); Secondary Schools at 17 (83% of girl students had been sexually harassed). Peer harassment is the most common form of sexual harassment. See Hostile Hallways at 11 (of the students who have been harassed, four out of five were harassed by a fellow student); Secrets in Public at 6 (of the girls who were sexually harassed, 96% were harassed by peers).

Sexual harassment has a devastating effect on girls' educational, emotional, and physical development. For

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[12] See Nan Stein, et al., Secrets in Public: Sexual Harassment in Our Schools (1993) [hereinafter Secrets in Public]; AAUW Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools (1993) [hereinafter Hostile Hallways]; Valerie Lee, et al., The Culture of Sexual Harassment in Secondary Schools, Am. Educ. Res. J. (publication forthcoming 1996) [hereinafter Secondary Schools].

example, studies show that 33% of girls who suffered sexual harassment say they do not want to attend school; 32% report not wanting to talk as much in class; 28% find it harder to pay attention in school; and 18% report thinking about changing schools. See Hostile Hallways at 15-16. Sexually offensive hostile environments may reduce female students' class participation, and may even cause women to drop out of classes entirely. Bernice R. Sandler, The Chilly Classroom Climate: A Guide to Improve the Education of Women, 15-17, 19 (Nat'l Ass'n for Women in Educ. 1996). In addition, 64% of the girls who have been harassed report suffering from embarrassment; 52% of them report feeling self-conscious; 43% of them feel less sure or less confident about themselves; and 30% of them doubt whether they can ever have a happy romantic relationship. See Hostile Hallways at 16-17.

The harm of sexual harassment does not result from the aftermath of the incident itself. Rather, the emotional, physical and educational harm to students who are sexually harassed, as well as the prevalence of sexually harassing conduct, is exacerbated by schools' failure adequately to respond to the problem. See Stefanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459, 466-69 (1994).[13]

Schools are not helpless in the face of these dramatic and sobering statistics. In fact, studies show that schools' prompt and effective attention to the problem can reduce

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[13] See also JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Law & Ineq. J. 163, 177 (1992) (linking schools' failure to take action against sexually harassing behavior with students' uncertainty about what conduct is prohibited).

both the incidence and the devastating effects of sexual harassment. Appropriate training for teachers and other school personnel enables them to address peer sexual harassment and to respond effectively when they witness incidents, and leads to heightened awareness by both students and teachers.[14] A sexual harassment program that includes training for students helps reduce sexual harassment as well.[15]

Studies also show that schools' actions, including adopting and implementing a clear sexual harassment policy and grievance procedure, can reduce the incidence of sexual harassment. See Elizabeth A. Williams, et al., Impact of a University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 57, 59, 62-63 (1992) (finding that continuing and intensive sexual harassment education increased awareness and reduced sexual

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[14] See Helena K. Dolan, The Fourth R--Respect: Combatting Peer Sexual Harassment in the Public Schools, 63 Fordham L. Rev. 215, 243 (1992) (citing DeNeen L. Brown, Schools Get Tough on Unwanted Touching: 'Boys Will Be Boys' Is No Defense as Girls Become Aware of Rights, Wash. Post, June 28, 1992, at A1).

[15] Two separate studies of undergraduate students reveal that male students who participated in sexual harassment training programs became increasingly aware of what constitutes sexual harassment and became more sensitive to students who were harassed. See Douglas D. Smith, The Efficacy of a Selected Training Program on Changing Perceptions of Sexual Harassment (1993) (unpublished Ph.D. dissertation, University of Northern Colorado) (on file at NOW LDEF); Kathleen Beauvais, Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes, 12 Signs 130, 130-45 (1986). See also Nan M. Higginson, Addressing Sexual Harassment in the Classroom, Educ. Leadership, Nov. 1993, at 93, 93-96; Robert Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide 142-48 (1994) (training programs in Minnesota and Nebraska increased awareness and reduced sexual harassment in schools).

sexual harassment in schools). Holding schools liable for the consequences of peer sexual harassment provides a compelling incentive for schools to take these critical steps. See Strauss, supra, at 178; Baker, supra, at 307; Jollee Faber, Expanding Title IX of the Education Amendments of 1972 To Prohibit Student to Student Sexual Harassment, 2 UCLA Women's L.J. 85, 91 (1992).

These studies confirm what courts increasingly have recognized and what the Rowinsky decision rejects, that schools must take prompt and effective remedial action to stop peer sexual harassment in order to ensure equal educational opportunities for both boys and girls.

CONCLUSION

For the above stated reasons, amici curiae urge the Court to grant the petition for a writ of certiorari.

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APPENDIX

American Association of University Women

The American Association of University Women (AAUW) has worked since 1881 to promote equity and education for all women and girls. AAUW's 162,000 members are women and men college graduates committed to ensuring equal educational opportunity for all. Vigorous enforcement of Title IX is a priority issue for AAUW, which has urged its members to take action on the findings of *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*. Released by the AAUW Educational Foundation in 1993, *Hostile Hallways* documented that sexual harassment is a daily occurrence in public schools and that it has severely negative effects on the education of both female and male students.

American Jewish Congress

The American Jewish Congress is an organization of American Jews dedicated to the fight against all forms of discrimination, prejudice and inequality. Its Commission for Women's Equality is an activist leaders' group of Jewish women and men whose goal is to pursue vigorously full equal rights for women within a Jewish context.

Because sexual harassment in the school setting, whether instigated by teachers or fellow students, prevents students from taking full advantage of educational opportunities and constitutes a form of sex discrimination, the American Jewish Congress Commission for Women's Equality believes that schools must be held liable for failing to take prompt and effective action to curb such harassment.

California Women's Law Center

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Sex Discrimination, including sex discrimination in education, Reproductive Rights, Family Law, Violence Against Women and Child Care.

Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination because of sexual harassment. The issues raised in this case will have an enormous impact on the rights of girls to receive an education free of the terrible consequences of harassment. Thus, this case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to be heard by the Court in this appeal.

Connecticut Women's Education and Legal Fund, Inc.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF), is a non-profit women's rights organization incorporated in 1973. We have over 1,400 members. Our mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. We seek to join this brief as amicus curiae because we believe that sexual harassment in schools, including peer to peer harassment, creates a barrier to student learning and equal educational opportunities.

Equal Rights Advocates

Now in its twenty-second year, Equal Rights Advocates (ERA) is one of the country's oldest women's law centers. ERA is dedicated to empowerment of women through the establishment of their economic, social, and political equality. Beginning in 1974 as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues including litigation, advice and counseling, public education and public policy initiatives. Since its early days, ERA has worked to end sexual harassment. ERA represented the plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). More recently, ERA filed an amicus brief before the United States Supreme Court in Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993). ERA has continued its efforts to eradicate sexual harassment through litigation, public policy initiative, and counseling hundreds of individual women on their legal rights.

ERA currently is co-counsel in Doe v. Petaluma, No. C-93-0123 (CW) (N.D. Cal), a student-on-student sexual harassment case raising many of the same issues as those before the Court here of the scope of Title IX's prohibition of sexual harassment in the schools. ERA has appeared as amicus in numerous cases concerning girls' rights to be free from sexual harassment and sexual discrimination in the schools, including Franklin v. Gwinett Country Pub. Sch. Dist., 112 S. Ct. 1028 (1992) and Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993).

Jewish Women International

Jewish Women International was founded in 1987 as B'nai B'rith Women by a group of Jewish women who sought

to improve the quality of life for women in their communities. Now an organization of over 50,000 women in the United States and Canada, JWI continues to speak out on issues that affect women -- in their communities, families, and in society. JWI advocates for adequate, just, and harassment-free educational opportunities for all.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund (Lambda), is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization dedicated to these goals. Lambda is specifically interested in the issue raised by this case because lesbian, gay, and HIV-infected schoolchildren have themselves been the targets of peer harassment in public schools. Lambda is counsel in Nabozny v. Podlesny, 95-3634, an appeal pending in the Seventh Circuit that is the first federal appellate challenge based on a school's denial of equal protection and due process in its response to anti-gay peer harassment. Lambda has an interest in the issue in this case because of our related efforts to create the obligation to provide lesbian and gay children with a safe environment in which to get their education, and to teach children to respect others.

National Association for Girls and Women in Sport

The National Association for Girls and Women in Sport (NAGWS) is a non-profit, education based organization designed to serve the needs of administrators, teachers, coaches, officials, leaders, parents, students, media, and participants of sport programs for girls and women. NAGWS began in 1899 and continues today as one of twelve

associations composing the American Alliance for Health, Physical Education, Recreation and Dance. A nationally focused membership of 5,500 (25,000 Alliance members), NAGWS is the only professional based organization devoted exclusively to providing opportunities for girls and women in sport-related disciplines and careers.

As part of the NAGWS mission, advocacy for gender equity and respect for girls and women is a primary issue. The fact that our members work in the hallways and gymnasiums of schools provides our organization with a great personal concern and commitment to eradicate sexual harassment in schools.

National Association of Social Workers

The National Association of Social Workers, Inc. (NASW), a nonprofit professional association with over 150,000 members, is the largest association of social workers in the world. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession, and to improving the quality of life through utilization of social work knowledge and skills. NASW believes that our nation's schools should provide a physically and emotionally safe environment for all children. NASW's school social worker section is particularly concerned about the harmful effects of sexual harassment and sex discrimination among peer groups in the schools.

National Center for Lesbian Rights

Founded in 1977, the National Center for Lesbian Rights (NCLR), is a national public interest law organization that advocates, through litigation and education, for women and men who confront discrimination on the basis of their sexual

orientation. NCLR's Youth Project provides the only national legal program for lesbian, gay, bisexual, and gender nonconforming youth. NCLR is particularly dedicated to combating discrimination on the basis of gender and sexual orientation in public schools, and to ensuring that all students have an equal opportunity to learn in an environment of safety and respect.

National Education Association

The National Education Association (NEA) is a nationwide employee organization with approximately 2.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions, including sexual harassment, and, to this end, firmly supports the vigorous enforcement of Title IX.

National Organization for Women Foundation

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a membership of over 250,000 women and men in more than 600 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure equality and fair treatment for girls and women, particularly including freedom from sexual harasssment in schools and on the job. We have a strong interest in the proper application and enforcement of Title IX to prevent peer sexual harassment.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is eliminating barriers that deny women and girls equal opportunity, such as sexual harassment. For years, NOW LDEF has fought for educational equity for girls. In April 1993, NOW LDEF and the Wellesley College Center for Research on Women released the results of a survey on sexual harassment in schools that they conducted through Seventeen magazine. NOW LDEF currently is co-counsel in Doe v. Petaluma, 830 F. Supp. 1560 (N.D. Cal. 1993), a peer sexual harassment case raising many of the same issues concerning the scope of Title IX's prohibition of sexual harassment in the schools before the Court here. NOW LDEF has appeared as amicus in numerous cases concerning girls' rights to be free from sexual harassment and sex discrimination in the schools, including Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992), and Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996).

National Women's Law Center

The National Women's Law Center (Center) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to ensure equal educational opportunities for girls and women through legislative and

administrative advocacy, public education and litigation to enforce Title IX. The Center has been a leader in advocating for the full enforcement of Title IX, and has actively participated in Congressional efforts to amend the Act and every Supreme Court case interpreting Title IX, including filing the lead amicus brief in Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992). The Center was co-counsel in Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), a peer sexual harassment case involving similar issues of Title IX's application to sexual harassment in schools. In addition, the Center has played a major role in shaping the law of sex discrimination and sexual harassment in the workplace under Title VII, participating as amicus in every Title VII sex discrimination case in the Supreme Court, including Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), and Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993), and in numerous sexual harassment cases in the lower courts. The Center has a deep and abiding interest in ensuring that women and girls have access to a school environment that is free from sexual harassment and abuse.

Northwest Women's Law Center

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWLC has been dedicated to challenging barriers to gender equality in education with a focus on the barriers created by sexual harassment. Toward that end, the NWLC has participated in cases throughout the country to ensure the availability of legal remedies for victims of sexual harassment. The NWLC also conducts sexual harassment in education workshops, produces legal rights education materials on the issue, and has led numerous legislative efforts to protect and advance the legal rights and

remedies available to victims of sexual harassment in school. The NWLC has a strong interest in the present case in ensuring that Title IX of the Education Amendments of 1971 is interpreted to provide the fullest possible protection to students against sexual harassment in school.

Puerto Rican Legal Defense and Education Fund

The Puerto Rican Legal Defense and Education Fund (PRLDEF), is a national civil rights litigation organization founded in 1972. Its mission is to further and protect the civil rights of Puerto Ricans and other Latinos. PRLDEF has brought many lawsuits under the various federal civil rights acts to protect Latino women. The decision by the Fifth Circuit in this matter undercuts PRLDEF's efforts on behalf of Latinas.

Women Employed

Women Employed is a national organization of working women, based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education.

Women's International League for Peace and Freedom

The Women's International League for Peace and Freedom (WILPF) was founded in 1915 as a nation-wide grassroots organization. Currently we have more than 100 branches in communities across the country, comprising a membership of approximately 10,000. WILPF's mission is to work to create an environment of political, economic, social and psychological freedom for all members of the human

community, so that true peace can be enjoyed by all. As such, the case of Rowinsky v. Bryan Independent School District is of deep concern to us. The environment created for Jane and Janet Rowinsky in their school is not only violent and intimidating, but that violence and intimidation have a chilling effect on their right to an equal education. We feel strongly that the rights of the girlchild need to be asserted in this situation, because it is legally appropriate to do so and in order to bring the U.S. in line with international documents such as the U.N. Convention to End All Forms of Discrimination Against Women and the Platform for Action.

Women's Law Center of Maryland, Inc.

The Women's Law Center of Maryland, Inc., is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. The Women's Law Center has an interest in the elimination of all forms of discrimination, and has been particularly involved with cases of sexual harassment.

Women's Law Project

The Women's Law Project (WLP) is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past twenty-two years, WLP's activities have included extensive work in the area of sex discrimination in education. WLP has a strong interest in the availability of strong and effective remedies for peer

sexual harassment under Title IX of the Education Amendments of 1972.

Women's Legal Defense Fund

Established almost 25 years ago, the Women's Legal Defense Fund is a national advocacy organization that works on behalf of women and their families. WLDF promotes public policies to ensure equal opportunity and economic security for women, especially low income women and women of color. The Fund has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. WLDF has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs amicus curiae in the Supreme Court to advance women's opportunities in education.

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No. 96-4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DEBRA ROWINSKY, for herself and as next friend of "JANE DOE" and "JANET DOE," her minor children, and for all those similarly situated,

Petitioner,

vs.

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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38 pp

QUESTION PRESENTED

May a female middle school student sue her school district for money damages under Title IX based on allegations that she was harassed by boys at school, when the summary judgment evidence shows that school officials disciplined the boys who allegedly harassed her and there is no evidence that school administrators responded to complaints of student harassment in an intentionally discriminatory manner?

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I. The Fifth Circuit decision does not conflict with any prior decision of this Court. 11

II. The circuit courts are not in conflict on the issue of whether institutions may be held liable for the harassing acts of non-agents. 14

III. *Rowinsky* is consistent with this Court's prior treatment of claims based on violations of Spending Clause statutes; therefore, the decision presents no issues requiring correction by the Court. 17

IV. Petitioner's argument is based on fragile analogies to matters of law not yet decided by the circuit courts, thus granting the Petition would be premature. 20

V. To date, the Department of Education has not promulgated a single regulation on sexual harassment. 23

VI. Petitioner's concerns about discrimination against girls raises numerous issues of public policy; such concerns, however, must be resolved by Congress and the states, not by the Supreme Court. 25

VII. *Rowinsky* is consistent with this Court's prior decisions cautioning against federal interference with the implementation of school disciplinary rules. 26

VIII. Granting the Petition would be futile because, even under Petitioner's theory, the Respondent would be entitled to summary judgment. . . 27

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No. 96-4

IN THE
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DEBRA ROWINSKY, for herself and as next friend of "JANE DOE" and "JANET DOE," her minor children, and for all those similarly situated,

Petitioner,

vs.

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Bryan Independent School District, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's decision in this case. That decision is reported at 80 F.3d 1006.

RESPONSE TO PETITION'S "INTRODUCTION"

The Petition's Introduction and Question Presented presume, erroneously, that the courts below found that the Bryan Independent School District (Bryan ISD or District) was aware of "severe and pervasive" student-to-student harassment and that it refused to take corrective action in response to known complaints. This case is on appeal from the district court's decision to grant the Bryan ISD's motion for summary judgment. The record shows that Jane and Janet Doe complained about three boys and that all three boys were punished. While Petitioner asserts that the punishment was inadequate, the district court found that she failed to raise a fact issue showing that her daughters' gender influenced the District's response to their complaints.

In affirming the summary judgment, the Fifth Circuit scrutinized the legislative history and language of Title IX and the statute's origin under the Spending Clause and concluded that Congress did not intend to hold school districts financially responsible for the conduct of non-agent adolescents. Consistent with this Court's prior decisions, the Fifth Circuit properly held that students seeking money damages from their schools for student-to-student harassment must show intentional discrimination by the school district itself, not negligent discipline. Absent evidence of intentional discrimination, the judicial inquiry under Title IX ends, even if a court believes that the school district could have done more. The Fifth Circuit's holding is consistent with this Court's previous admonishments that the federal courts not interfere with the implementation of school disciplinary rules.

Although a divided panel of the Eleventh Circuit has held that school districts may be held monetarily liable in cases of student-to-student harassment, that decision has been

vacated, and thus there is no circuit court decision in conflict with the Fifth Circuit. Likewise, the Fifth Circuit decision does not conflict with any regulations of the U.S. Department of Education, which, to date, has not promulgated a single Title IX regulation on sexual harassment. Petitioner's argument that a conflict exists is based on a 1992 "letter finding" of a regional office of the Department of Education's Office of Civil Rights (OCR) following an investigation of another school district. The letter states that a district may be found in "noncompliance" if it fails to respond "adequately" to incidents of student-to-student harassment. Such case-specific letter findings are accorded little, if any, deference by the courts. Further, an OCR decision of "noncompliance" is irrelevant to the question of whether damages can be awarded in a lawsuit. Prior decisions of this Court show that noncompliance may be the result of unintentional discrimination, for which no damages may be had.

Contrary to the Petition, *Rowinsky* will not leave female students in the Fifth Circuit without protection "from debilitating peer harassment." School districts may lose their federal funding, may be investigated by the OCR, and may be sued for damages where intentional discrimination by the school district is established. Students also may file criminal charges against or sue their perpetrators.

Petitioner argues that Title IX *should* permit a damages action based on the acts of non-agent juveniles. However, Congress, not this Court, should decide this question of policy. The legal question before this Court is whether the Petitioner, in response to the motion for summary judgment, presented evidence raising an inference of discrimination, based on sex, by the Bryan ISD. Given the evidence in the record and the determination of the courts below based on that evidence, the Court should deny the petition.

STATEMENT OF THE CASE

Proceedings Below

The Petitioner filed this lawsuit on November 9, 1993. The Petitioner asserted numerous claims, including a claim under Title IX of the Education Amendments of 1972. The Bryan ISD filed a Rule 12(b)(6) motion to dismiss. The district court declined to dismiss the Title IX claim and ordered a more definite statement. The Petitioner amended, and the parties engaged in discovery during which the school district produced hundreds of documents reflecting student discipline patterns. The Bryan ISD then moved for summary judgment on all remaining claims. The motion was granted as to Petitioner's damages claims. With respect to the claim for injunctive relief, the district court found that the request was moot because Jane and Janet had moved out of the district and could not show a risk of future harm. (Pet. App. B-15 n. 9.) The Fifth Circuit affirmed the summary judgment.

The Petition does not question the Fifth Circuit's conclusion that Mrs. Rowinsky lacks standing to bring a claim on her own behalf. Similarly, the Petition does not discuss Petitioner's claim for injunctive relief; accordingly, the only question before the Court is whether Petitioner's claim for damages was properly dismissed.

Statement of Facts

Petitioner asserts that the Court must accept as true all facts alleged by the Petitioner in the record. This case is before the Court following the granting of summary judgment, not on the granting of a Rule 12(b)(6) motion to dismiss. The non-movant must do more than rest on her pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Once the party seeking summary judgment makes the initial showing,

negating any disputed material fact, the party opposed to the motion must offer affidavits or other evidence reflecting the existence of one or more genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The Petition contains colorful, conclusory flourishes that are not evidence (*e.g.*, sexual harassment was "accepted norm" at Bryan ISD," Pet. at 9; Bryan ISD had an "arcane and chauvinistic view of blaming the victim," Pet. at 9-10). Under Rule 56, the district court properly went beyond the statements of counsel and examined the actual evidence submitted by both parties. The district court found that the Bryan ISD punished the three boys about whom Jane and Janet complained and that it replaced the school bus driver whose supervision of students allegedly was inadequate. The district court concluded that the Petitioner failed to raise a fact issue that the Bryan ISD discriminated against Jane and Janet on the basis of their sex or that it discriminated against girls in general.

Jane and Janet Doe were eighth grade students who rode a school bus to and from school. On the bus in question, girls and boys sat on different sides. Jane and Janet Doe frequently sat on the boys' side and received warnings from the bus driver, Bob Owens. Jane and Janet did not deny this fact in their affidavits. (R. Vol. 7 at 1368, 1362.)

In her summary judgment affidavit, Jane Doe alleged that, in September 1992, she told the bus driver that G.S. "was touching me and would not leave me alone." (R. Vol. 7 at 1368.) Likewise, Janet Doe's affidavit alleged that, during September, she "complained" to Mr. Owens "no less than eight separate times," but her affidavit does not describe the nature of the complaints. (R. Vol. 7 at 1361.) The only specific allegation in this portion of her affidavit is that she allegedly told the bus driver that G.S. had "swatted" Janet and Jane on the bottom and that G.S. had used "foul language." Jane and

Janet's affidavits prove that most of the alleged incidents, so dramatically described in the Petition, were never reported to the bus driver.

In late September, Jane Doe complained to the bus driver that G.S. "touched her over her heart" and on a "private part." (R. Vol. 3 at 665.) Mr. Owens spoke to G.S. and wrote up a discipline referral form. In the Bryan ISD, bus drivers do not assign discipline; the administrators at the school where the student is enrolled assign discipline. Mrs. Rowinsky also reported this same incident to Randy Caperton, the middle school assistant principal. Because G.S. attended the high school, not the middle school, Mr. Caperton referred Mrs. Rowinsky's complaint to the high school, which suspended G.S. from the bus for five days.[1] (R. Vol. 3 at 665, 669, 677, 726.) G.S. was warned that any future incidents would lead to "permanent suspension" and he was directed to sit away from the girls.

On December 16, 1992, just prior to the winter recess, the Petitioner complained about a different boy, L.H. Again, Mr. Owens wrote a disciplinary referral form, and discipline was assigned by L.H.'s principal. (R. Vol. 3. at 665.) The discipline was to be implemented after the holiday break. During the break, however, L.H. moved away and was no longer enrolled in the Bryan ISD. (R. Vol. 3 at 720.)

Mrs. Rowinsky called upon other school administrators, asking for Bob Owens to be removed and for G.S. to be permanently barred from the bus. One administrator, Jay Anding, called to verify that G.S. was disciplined; informed

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[1]Although school records show that G.S. was suspended for five days, the Petition and the Fifth Circuit both state that the suspension was for three days. Respondent acknowledges that this conflict must be resolved in Petitioner's favor under Rule 56 of the Federal Rules of Procedure.

Mrs. Rowinsky of the administrator to contact to appeal any disciplinary decision of G.S.; viewed videotapes of student conduct on the bus; replaced Mr. Owens with a female bus driver; spoke to the new bus driver about keeping G.S. apart from Mrs. Rowinsky's daughters; and gave Mrs. Rowinsky the phone number of Dr. Tom Purifoy, the Title IX coordinator. C.W. Henry, the transportation administrator, personally met with Mrs. Rowinsky and viewed videotapes of student conduct on the bus. The videotapes revealed students leaving their seats and acting up; no sexually assaultive-type conduct was observed. (R. Vol. 3 at 657.) Mr. Henry subsequently approved Mr. Anding's assignment of a new bus driver. The superintendent, Dr. Sarah Ashburn, met with Mrs. Rowinsky, reviewed the disciplinary action taken against G.S., determined that the response was appropriate, and responded by letter. The Title IX coordinator also met with Mrs. Rowinsky and assisted her in meeting with Mr. Henry.

Although Jane Doe alleges that G.S. continued to bother the girls after his suspension, as the district court noted, the girls admitted in their affidavits that they did not report any new concerns to Mr. Owens. Furthermore, as the district court noted, they never reported *any* further misconduct after the Bryan ISD assigned a new bus driver to the route. Indeed, review of the bus videotapes showed that student conduct improved under the new bus driver.

On March 30, 1993, a history teacher observed Jane Doe and a male student F.F. disrupting class. The teacher sent both students to an assistant principal, Sandra Petty, who spoke to the students and contacted their parents. Mrs. Petty determined that F.F. had popped Jane's bra strap after Jane told him that her bra was unfastened. (R. Vol. 3 at 673, 724.) Mrs. Petty suspended him for the remainder of that day and for the next day. His classroom seat assignment also was changed.

(R. Vol. 3 at 724.) F.F.'s mother complained that the punishment was too severe. Mrs. Petty met with Mrs. Rowinsky and described the punishment given to F.F. As the district court found, neither Jane nor Janet reported any further incidents with F.F.

The Petition states that, as a result of the above, Jane and Janet suffered an inability to concentrate and that their emotional and psychological well-being was adversely affected. (Pet. at 3.) Their affidavits, however, contain no such allegations.

In response to the school district's motion for summary judgment, the Petitioner argued that harassment of girls in general was ignored by the Bryan ISD. She argued that, of 112 incidents of "fighting" at the middle school, 108 resulted in short-term suspensions, while, of 108 incidents of "sexual harassment," only five students were suspended. However, many of the discipline referrals considered "sexual harassment" by the Petitioner involved non-assaultive acts and, appropriately, received a lesser penalty than fighting, for example:

> A student dropped his pants and "mooned" others. He received two days of detention. (R. Vol. 7 at 1235.)
>
> A student used the expression "jacking off." He received five days of in-school suspension. (R. Vol. 7 at 1227.)
>
> A student showed an obscene picture in class. He received two days of in-school suspension. (R. 1238.)

Some of the so-called "sexual harassment" incidents did result in suspension when physical contact was involved (*e.g.*,

touching breasts: five days; popping a bra strap: 1 ½ days suspension). Finally, some of the "fights" received a punishment less than suspension (e.g., pulling hair: student given a warning). The data on all incidents shows that both girls and boys who misbehaved were punished. (R. Vol. 7 at 1269-1137, 1117-1021.) The student's age and conduct--not his or her gender--determined the consequence.

The Petition also makes conclusory assertions about the alleged inadequacy of the Bryan ISD's policies and procedures. For example, while Mrs. Rowinsky asserts that she was not personally informed of her rights, the record shows that the school district gave all students and parents copies of the student code of conduct, which provides explicit information on student rights. The record also shows that the Bryan ISD maintained a grievance procedure for students to lodge complaints about any matter; designated a Title IX coordinator by name and described the grievance procedure for discrimination complaints; adopted policies prohibiting the use of profanity and vulgar language, verbal abuse, inappropriate physical contact, and harassment; and maintained policies prohibiting assault as defined in the Texas Penal Code. Finally, the district publicized its Title IX compliance efforts in the local newspaper; the clippings are part of the record. (R. Vol. 3 at 689, 696, 702, 706, 709, 714, 716, 805, 810, 816, 830-729.)

The Petition also inappropriately relies on an unofficial and unauthenticated investigation report by a regional office of the Office of Civil Rights that contains interviews with anonymous students. The Bryan ISD filed extensive written objections with the district court to the unauthenticated, unsworn hearsay evidence.[2] (R. Vol. 2 at 1538-1572.) Neither

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[2]Hearsay may not be used to generate an issue of fact. *See Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995); *Cormier v.*

the district court nor the court of appeals referred to the report in their opinions. The OCR report allegedly recorded 254 "sexual misconduct incidents," 94.1 percent of which resulted in documented sanctions, according to the report. The "sexual misconduct incidents" included a student's displaying of condoms, a male student's "mooning" the girl's choir, a male student's darting through the girl's locker room, and a female special education student's touching herself in class. These other allegations not only are hearsay, they are immaterial under Rule 56. Both lower courts properly focused on what Jane and Janet themselves personally experienced and whether the district--not fellow students--discriminated against Jane and Janet on the basis of their sex.

The Petition also contains allegations involving another Bryan ISD student, J.S. Like the OCR report, the allegations of J.S. are immaterial. This lawsuit was never certified as a class action, and neither Jane nor Janet knew J.S. or observed anything that happened to her. J.S. had preexisting emotional and family problems, including reported multiple personalities. She had documented problems with being disruptive and using obscene language, and school officials and counselors worked closely with her on her mental health and educational needs. Respondent's summary judgment affidavits showed that most of J.S.'s harassment allegations were never reported to school officials and that her specific complaints were appropriately addressed by school officials. (R. Vol. 3 at 848, Ex. 9.)

Pennzoil Exploration & Prod. Co., 969 F.2d 1559, 1561 (5th Cir. 1992).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Fifth Circuit decision does not conflict with any prior decision of this Court.

In *Franklin v. Gwinnett County Public Schools*,[3] this Court held that money damages are recoverable under Title IX in cases involving allegations of intentional discrimination but not unintentional discrimination. The plaintiff in *Franklin* had alleged that an *adult* teacher allegedly pressured her into having sexual intercourse and that school administrators interfered with her right to pursue a Title IX charge. Her suit had been dismissed on the ground that money damages were not available under Title IX. This Court reversed, holding that damages are available in certain cases. The Court found that the plaintiff's allegations of intentional discrimination were adequate to defeat a Rule 12(b)(6) motion to dismiss. In dicta, the Court stated that "sexual harassment" of a student by an adult employee because of the student's sex can be a form of "sexual discrimination," citing *Meritor Savings Bank, FSB v. Vinson*,[4] an employment case under Title VII of the Civil Rights Act of 1964.[5] The Court did not compare Title IX and Title VII, did not define the standard of liability for acts of agents (much less non-agents), and never even used the phrase "hostile environment."[6] The Court specificaily declined to

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[3]503 U.S. 60 (1992).

[4]477 U.S. 57 (1986).

[5]42 U.S.C. § 2000e (1994).

[6]Petitioner's view is that, because *Franklin* is not a "quid quo pro" harassment case, then, of course, it must be a "hostile environment" case. This analysis begs the question of how much, if any, of the traditional Title

decide whether Title VII principles should apply in a Title IX damages suit.[7] *Rowinsky* does not conflict with *Franklin.*

Nor does the Fifth Circuit's decision conflict with the other decisions cited by Petitioner. In *Cannon v. University of Chicago*,[8] an admissions policy case, the Court held that Title IX is enforceable through an implied private right of action. In *North Haven Board of Education v. Bell*,[9] the Court determined that school employees are "persons" protected by Title IX[10] and that, therefore, the U.S. Department of Education had authority under 20 U.S.C. §1682 to promulgate regulations pertaining to school employment practices. Neither opinion discusses sexual harassment, damages claims, or the standard of liability for the acts of agents or non-agents.

II. The circuit courts are not in conflict on the issue of whether institutions may be held liable for the harassing acts of non-agents.

Petitioner asserts that the federal appellate courts are in "substantial conflict" on the issue of "peer sexual harassment." (Pet. at 17.) Given that the Supreme Court did not even recognize a damages claim under Title IX until the *Franklin*

VII analysis applies to Title IX claims.

[7] *Franklin*, 503 U.S. at 65 n. 4.

[8] 441 U.S. 677 (1979).

[9] 456 U.S. 512 (1982).

[10] Title IX states in part: "No *person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1988) (emphasis added).

case in 1992, such claims are only now beginning to surface in the circuit courts. Only one case cited by Petitioner actually conflicts with *Rowinsky*. That decision, *Davis v. Monroe County Board of Education*,[11] was vacated on August 1, 1996, upon the granting of the school district's petition for rehearing en banc. Thus, the conflict no longer exists.

The remaining cases cited by Petitioner present no conflict. Indeed, the Tenth Circuit decision *Seamons v. Snow*[12] actually complements *Rowinsky*. In *Seamons*, a football player named Brian was subjected to a sexually explicit hazing incident by other football players. Football season was later cancelled, which increased student hostility toward Brian. He alleged that the District's response to the "hostile environment" was based on the male stereotype that he should have taken the abuse "like a man." As Amici note, although *Seamons* cited the now vacated *Davis* decision, the Tenth Circuit approached the case the way the Fifth Circuit approached *Rowinsky*, ultimately rejecting Brian's claim because he failed to show that the school officials' conduct was based on his sex. The court noted that Brian did not allege that the school district would have acted differently "if a similar event had occurred in the women's athletic program." The court specifically declined to decide "what liability, if any, the school district might have for the acts of its students" or whether negligence would be a sufficient basis on which to impose liability.[13]

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[11]74 F.3d 1186, *vacated*, No. 94-9121, 1996 WL 438188 (en banc) (11th Cir. Aug. 1, 1996).

[12]84 F.3d 1226 (10th Cir. 1996).

[13]*Id.* at 1332 n.7.

The remaining cases cited by Petitioner are either inapplicable or distinguishable. The First Circuit case[14] is factually dissimilar, having involved a mandatory *school-sponsored* assembly on AIDS awareness that contained sexually explicit skits. Further, although the court recognized the concept of a school-created "hostile environment," the court found the allegations insufficient to state a claim.

The Second Circuit case[15] involved an adult dental student who allegedly was harassed by a patient at the clinic where she worked. The Second Circuit declined to decide whether an entity that fails to prevent harassment by a non-agent may be held liable under either Title VII or Title IX.[16] Rather, the court determined that, even if the standard did apply, the dental student's complaint would fail.

The Ninth Circuit decision cited by Petitioner, *Clyde K. v. Puyallup School District*,[17] is not even a Title IX case. *Clyde* involved a student with Tourette's Syndrome who used sexually explicit remarks at school. In determining the proper placement for the student under the federal law pertaining to disabled

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[14]*Brown v. Hot, Sexy, and Safer Productions Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1044 (1996). The First Circuit also decided *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), which involved a medical school resident employed at a hospital. The circuit court recognized a Title IX "hostile environment" claim but emphasized that its holding was limited to the employment context and observed that the action was limited to declaratory and injunctive relief. *Id.* at 884 n.3, 897.

[15]*Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995).

[16]*Id.* at 250.

[17]35 F.3d 1396 (9th Cir. 1994).

children,[18] the court observed, in dicta, that it was appropriate for school officials to consider the effect of Clyde's remarks upon others and to consider possible liability.

In short, with the exception of the vacated *Davis* decision, none of the circuit cases cited by Petitioner conflicts with the Fifth Circuit decision. The Respondent acknowledges that, at the district court level, some courts agree with the *Rowinsky* approach and some disagree with it. As stated above, however, Title IX damages claims are only now surfacing in the circuit courts. The existence of disagreement in the district courts does not merit granting the Petition.

III. *Rowinsky* is consistent with this Court's prior treatment of claims based on violations of Spending Clause statutes; therefore, the decision presents no issues requiring correction by the Court.

Rowinsky is consistent with prior decisions of this Court concerning remedies for violations of a Spending Clause statute. In contrast, Petitioner's negligence proposal, which would permit damages claims against schools that fail to prevent students from harassing each other, is inconsistent with this Court's Spending Clause jurisprudence. The Spending Clause enables Congress to place conditions on the receipt of federal dollars by grantees.[19] The legitimacy of the power is the *voluntary* and *knowing* acceptance of the conditions by the grantee.[20]

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[18]Individuals with Disabilities Education Act, 20 U.S.C. § 1401 (1988).

[19]*See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[20]451 U.S. at 17.

Although the Court in *Franklin* reserved the issue of whether Title IX was enacted under the Spending Clause,[21] because Title IX is patterned after the anti-race discrimination statute Title VI and is similarly construed,[22] and because Title VI was enacted pursuant to the Spending Clause,[23] lower courts have presumed that Title IX is a Spending Clause statute.[24]

Franklin's treatment of damages claims under Title IX was based largely on the Title VI case *Guardians Association v. Civil Service Commission of New York*,[25] a case decided without a majority opinion. *Guardians* involved an employment test that had a disproportionate impact on racial minorities, which a majority of justices viewed as unintentional discrimination for which no damages could be had. "In this and similar situations," Justice White wrote, "it is not immediately obvious what the grantee's obligations were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations."[26]

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[21]503 U.S. at 75 n.8.

[22]*See Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-95 (1979).

[23]*See Guardians Ass'n v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 598-599 (1983).

[24]*See Rowinsky*, 80 F.3d at 1012 n.14; *Doe v. Petaluma City School Dist.*, 830 F.Supp. 1560, 1574 n.9 (N.D. Calif. 1993); *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 622 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992).

[25]463 U.S. 582 (1983).

[26]463 U.S. at 598. Likewise, *Franklin* states that damages are unavailable in cases of "unintentional" discrimination because the entity lacks notice that it will be held monetarily liable. 503 U.S. at 74.

In the Bryan ISD's case, it surely was not "obvious" that the district in 1992-93 was administering its student disciplinary rules in a manner that violated Title IX. Neither Title IX nor its regulations define or even mention sexual harassment or student discipline. *See* text, *infra*, at 20-21. The regulations that do exist concern athletics, admission, housing, and the like. *See* 34 C.F.R. §§ 106.1-106.61. Further, the regulations are devoted to acts by the grantees in administering those programs. Likewise, the legislative history of Title IX shows that both supporters and opponents focused exclusively on the acts of grant recipients.[27] The opinions in *Guardians, Cannon, Pennhurst,* and other Spending Clause cases have focused on the policies and actions of the grant recipient itself.

Petitioner's proposal to eliminate the requirement of intentional discrimination by the grantee is inconsistent with this history. Petitioner's Title VII-style approach is particularly ill-suited to a Title IX implied cause of action because, unlike Title IX, Title VII is tempered by statutory provisions that protect the employer from far-reaching liability, the most important of which is a statutory ceiling on the amount of monetary damages that are recoverable.[28] Title IX contains *no* statutory restrictions on damages. In one recent Title IX teacher/student molestation case, the jury awarded the student $1.4 million, leading the district judge to enter a remittitur:

> [E]ven rich districts would be strapped by a verdict of $1.4 million. Certainly, the Congress did not intend for Title IX suits to bankrupt

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[27] *See Rowinsky*, 80 F.3d at 1013-14 (describing floor debates).

[28] *See* 42 U.S.C. § 1981a(b)(3) (1994).

> school districts...Everyone but a random plaintiff loses in such situations.[29]

Under Petitioner's analysis, financially strapped school districts would face greater exposure under Title IX than huge corporations face under Title VII. Petitioner seeks certiorari to press her request that the Court recognize a new Title IX damages cause of action, with a low threshold of proof, outside of the legislative process. This is not a proper basis on which to grant review.

IV. Petitioner's argument is based on fragile analogies to matters of law not yet decided by the circuit courts, thus granting the Petition would be premature.

To date, no circuit court has found an employer liable under Title VII for the acts of non-agents, and no circuit court has yet defined the standard of liability under Title IX in cases involving harassment by a school agent, such as the teacher/molester in *Franklin*. Given that Petitioner's argument is based on fragile analogies to propositions of law that have yet to be fully explored by the circuit courts, review by this Court is simply premature.

While Title IX and Title VII share a common prohibition against "sexual discrimination" and while, over time, some Title VII doctrines have been found to be useful in

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[29] *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947, 955 (W.D. Tex. 1995); *see also Howard v. Board of Educ. Sycamore Dist.*, 876 F.Supp. 959, 974 (N.D. Ill. 1995) ("[I]t is difficult to imagine that Congress intended to open schools and educational agencies to virtually unlimited liability based on the conduct of their employees.").

certain Title IX cases,[30] the two statutes are substantively different.[31] As this Court explained in *North Haven* in comparing Title VI and Title IX, "For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."[32]

One of the key differences between Title IX and Title VII, completely ignored by Petitioner and Amici, is that Title VII expressly defines "employer" to include the employer's "agents."[33] Consequently, courts have applied the common law rules of agency to Title VII claims, which led to the development of the negligence standard now advocated by

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[30]*See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (using Title VII "disparate impact" concept in case challenging discontinuation of women's softball program), *cert. denied*, 510 U.S. 1004 (1993); *Preston v. Commonwealth of Va.*, 31 F.3d 203, 206 (4th Cir. 1994) (using "mixed motive" concept in Title IX employment action).

[31]*See, e.g., Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 145 (W.D. Pa. 1989)(declining to "blandly blur the distinctions" between Title VII and Title IX and refusing "to transfer wholesale the EEOC guidelines into an area for which they were not drafted"), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989); *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560 (N.D. Calif. 1993) (concluding that Title IX's "prohibitions and remedies" are not co-extensive with Title VII's); *see also Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617, 622 (11th Cir. 1990)(concluding that application of Title VII law to Title IX cases was too "confusing"), *rev'd on other grounds*, 503 U.S. 60 (1992).

[32] 456 U.S. at 530.

[33]42 U.S.C. § 2000e(b)(1994); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (stating that courts should look to common-law agency principles for evaluating employer liability under Title VII).

Petitioner.[34] In contrast, Title IX contains no "agency" provision, and, thus, there is no textual support for applying a Title VII-style analysis.[35]

Moreover, even under Title VII, it is not clearly established that employers may be held liable for the wrongful acts of non-agents. This Court has previously recognized that Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties."[36] Respondent has not found any circuit court decisions in which an employer under Title VII was found liable for harassment by non-agents.[37] Amici, however, assert that it is "beyond cavil"

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[34]*See generally Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988) (negligence standard applies in hostile environment case); *Hirschfield v. New Mexico Corrections Dep't.*, 916 F.2d 572, 577 (10th Cir. 1990) (negligence standard applies in hostile environment case).

[35]*See Howard*, 876 F.Supp. at 972-74 (rejecting Title VII agency analysis in Title IX harassment case); *Floyd v. Waiters*, 831 F.Supp. 867, 876 (M.D. Ga. 1993) (rejecting Title VII agency analysis in Title IX harassment case); *see generally* Schneider, "Sexual Harassment and Higher Education," 65 TEX. L. REV. 525, 568-571 (1987) (analyzing absence of agency provision in Title IX); *see also Alexander v. Yale Univ.*, 459 F.Supp. 1, 3 (D. Conn. 1977)("the concept of mere *respondeat superior* appears ill-adapted to the question of Title IX sex discrimination based on harassment incidents"), *aff'd*, 631 F.2d 178 (2nd Cir. 1980).

[36] *City of Los Angeles v. Manhart*, 435 U.S. 702, 718 n.33 (1978).

[37]The issue has been acknowledged in dictum. The Second Circuit in *Murray v. N.Y. College of Dentistry*, 57 F.3d 243, 250 (2d Cir. 1995), acknowledged that the EEOC has adopted a "non-binding" guideline on harassment caused by non-agents (see 29 C.F.R. § 1604.11(e)), but the court declined to decide the propriety of the regulation. In *Henson v. Dundee*, 682 F.2d 897, 910 (11th Cir. 1982), the Eleventh Circuit remarked that a work environment can be rendered offensive by supervisors, coworkers, "or even strangers." *Henson*, in turn, cited *EEOC v. Sage Realty*

that employers under Title VII may be held liable for failing to prevent harassment by non-agents. (Amici's Brief at 9-10.) Amici's only support for such a proposition is a small handful of district court decisions. Such cases have involved the harassing acts of an independent contractor doing business with the employer or, less frequently, of a paying customer.[38] The analogy is inapplicable to schools, which have no economic incentive whatsoever to tolerate student misconduct. In any event, the issues raised by Petitioner concerning non-agents have not been fairly considered by the lower courts, making review by this Court premature.

V. To date, the Department of Education has not promulgated a single regulation on sexual harassment.

Petitioner's and Amici's discussion on the Department of Education omits a critical fact that would certainly help the Court in evaluating whether certiorari should be granted: *the Department of Education has never promulgated any regulations on the issues of sexual harassment or peer harassment*. The Title IX regulations are completely silent.[39]

Corp., 507 F.Supp. 599 (S.D.N.Y. 1981), in which the female plaintiff--an office building attendant--was required to wear a sexually provocative "Bicentennial uniform" that prompted visitors to make vulgar jokes. The court held that the requirement constituted sexual discrimination and was not a bona fide occupational qualification.

[38]*See Rowinsky*, 80 F.3d at 1011 fn. 11(citing cases).

[39]*See* 34 C.F.R. §§ 106.1-106.61 (1995). Title VI's regulations also are silent on these issues. 34 C.F.R. §§ 100.1-100.13 (1995). In 1994, however, long after this lawsuit was filed, OCR adopted a non-binding Title VI "investigative guideline" on racial harassment by agents and non-agents. 59 Fed. Reg. 11448 (1994). No such guidelines exist under Title IX.

In 1981, OCR, an office within the Department of Education, issued a "policy memorandum" on sexual harassment that addressed solely the issue of harassment by school employees.[40] The 1981 policy statement left unresolved the issue of student-to-student harassment.[41]

Petitioner's argument that a conflicts exists is based on a July 1992 "letter finding" of a regional OCR office following an investigation of another school district. The letter stated that "if harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."[42] Of extremely recent vintage, this letter finding, and a subsequent April 1993 letter written after the events in this lawsuit transpired, is not a longstanding policy statement of the Department of Education. The informal findings were authored by regional OCR staff members in connection with specific investigations and are not accorded the same deference owed to agency-wide regulations.[43] Further, an OCR decision of "noncompliance" is

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[40]OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981) (cited in *Rowinsky*, 80 F.3d at 1015).

[41]*Id.* at 10.

[42]Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992) (cited in *Davis*, 74 F.3d at 1192).

[43]*See generally Wolpaw v. Commissioner of Internal Revenue*, 47 F.3d 787, 791 (6th Cir. 1995) (case-specific interpretation taken in litigation obtains no deference); *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994)(deference to agency's interpretation as "prosecutor" was inappropriate); K. Davis, ADMINISTRATIVE LAW TREATISE 17 (3d ed. 1994) (level of deference depends on whether the rule was authored by the agency

irrelevant to the question of whether damages can be awarded in a lawsuit.[44] *Guardians* shows that noncompliance may be the result of unintentional discrimination, for which no damages may be had. Finally, agency expertise is not necessary at all to determine whether damages are available, "a function clearly within the purview of judicial competence."[45]

Amici also observe that certain regulations under Title IX, Section 504, and Title VI hold grant recipients responsible for the acts of non-recipients. (Amici's Brief at 13-14.) However, the regulations cited by Amici apply to business transactions and situations in which the recipient is contracting out for services. Such regulations merely echo this Court's admonishment that entities cannot avoid liability by delegating discriminatory programs to third parties.[46] They do not support Amici's proposition that schools are financially responsible for the random acts of teenagers.

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or merely a member or portion of the agency's staff).

[44] *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560, 1573 (N.D. Cal. 1993) (OCR letter findings did not address what judicial remedies are available in Title IX action). The letters are written following investigations of specific schools, and their purpose is to compel voluntary compliance. *See Rowinsky*, 80 F.3d at 1015 (citation omitted).

[45] *Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066, 1075 (2nd Cir. 1984); *Kelley*, 15 F.3d at 1107-09.

[46] *Manhart*, 435 U.S. at 718 n.33.

VI. Petitioner's concerns about discrimination against girls raises numerous issues of public policy; such concerns, however, must be resolved by Congress and the states, not by the Supreme Court.

Petitioner and Amici argue that sexual harassment of girls is an issue of national importance and that, as a result of *Rowinsky*, employees may have greater protection under Title VII than girls have under Title IX. Petitioner argues that this is inequitable. Title IX's perceived deficiencies, however, may not be cured by the courts. Congress, not this Court, should decide whether school districts should be subjected to potentially unlimited damages based on claims that students experienced harassment from fellow students. As this Court observed in *North Haven*, "policy considerations" are "for Congress to weigh, and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice."[47]

Here, the legislative choice of Congress, carefully outlined in the Fifth Circuit decision, prevents damages claims under Title IX in the absence of intentional discrimination by the grant recipient. Regardless of how hapless or insensitive Petitioner portrays the school administrators, she failed to raise an issue of material fact showing the influence of gender.[48]

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[47] 456 U.S. at 535 n.26.

[48] *Cf. Yusuf v. Vassar College*, 35 F.3d 709 (2nd Cir. 1994) (male student stated a claim when he alleged that he received a stiffer penalty for harassment of his roommate's girlfriend than the roommate received for assaulting the plaintiff); *Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d 779 (3rd Cir. 1990) (girl stated a claim by alleging that her dismissal from honor society for premarital sexual activity was discriminatory because similarly situated boy was not dismissed); *Ruh v. Samerjan*, 816 F.Supp. 1326, 1331 (E.D. Wisc. 1993) (plaintiff in teacher-student

This Court and the circuit courts in other contexts have shown a reluctance to hold public entities liable for the acts of non-agents. The circuit courts have rejected 42 U.S.C. § 1983 due process claims that were based on allegations that public school students were murdered, raped, or molested at school by fellow students.[49] This line of cases is based on this Court's decision in *DeShaney v. Winnebago County Department of Social Services*,[50] in which a state social worker negligently placed a boy with his abusive father, who battered the child nearly to the point of death. This Court held that the state social workers could not be held liable for failing to protect the child from private violence. In rejecting the claim, the Court observed

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation. But before yielding to that impulse, it is well to remember once again that the harm was

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harassment case failed to show that the university intentionally mishandled her complaints because of gender), *aff'd*, 32 F.3d 570 (7th Cir. 1994).

[49]*See, e.g., Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991 (10th Cir. 1994) (rejecting claim of parent of student murdered by another student known to be violent); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (rejecting claim of mentally retarded student who was raped in the showers by another student); *D.R. by L.R. v. Middlebucks Area Vocational Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992) (en banc) (rejecting claim of students who were molested by other students in classroom darkroom), *cert. denied*, 506 U.S. 1079 (1993); *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995) (en banc) (rejecting claim of student who was raped by a fellow student on two occasions).

[50]489 U.S. 189 (1988).

> inflicted not by the State..., but by Joshua's father. The most that can be said of the state functionaries ... is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.[51]

Although *DeShaney* was not a Title IX case, it vividly demonstrates the principle that the legislatures, and not the judiciary, bear the burden of creating new duties "in accordance with the regular lawmaking process."[52]

VII. *Rowinsky* is consistent with this Court's prior decisions cautioning against federal interference with the implementation of school disciplinary rules.

The Supreme Court has long recognized that the federal courts should not micromanage the public schools or interfere with the implementation of disciplinary rules.[53] Absent evidence of illegal considerations, "[i]t is not the role of the federal courts to aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion."[54]

"Peer harassment," whether sexual or not, is but one of many issues that school administrators must tackle with their limited resources. Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to establish an understanding of behavior. In the school setting,

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[51] *Id.* at 202-03.

[52] *Id.* at 203.

[53] *See Bd. of Educ. v. McCluskey*, 458 U.S. 966 (1982); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[54] *Wood v. Strickland*, 420 U.S. 308, 325 (1975).

punishment of students serves both a pedagogical and disciplinary function and is generally based on the student's age, credibility, and circumstances of the conduct. The Petitioners are asking the Court to define how much punishment is necessary to satisfy Title IX. Such an inquiry is not appropriate under Title IX, which, after all, is an anti-discrimination statute, not an all-purpose safety statute. Judicial involvement in this case appropriately ended upon a finding that the Petitioner failed to raise a genuine issue of material fact showing that the school district was influenced by gender in its handling of complaints. Congress did not mean for Title IX "to impair the independence" of schools in disciplining students.[55]

VIII. Granting the Petition would be futile because, even under Petitioner's theory, the Respondent would be entitled to summary judgment.

Even assuming *arguendo* that the Petitioner's theory had merit, the Court should not grant certiorari because the Petitioner failed to raise a genuine issue of material fact even under a Title VII-style analysis. Under Title VII, sexual harassment becomes actionable only when a *management-level* employee knew or should have known about severe and/or pervasive harassment and failed to take prompt, corrective action.[56] The alleged negligence of an hourly-wage school bus driver such as Bob Owens would not be imputed to an employer even under Title VII.[57] All three boys were

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[55] *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2nd Cir. 1994).

[56] *Hirschfield*, 916 F.2d at 577.

[57] *See generally Doe v. R.R. Donnelly & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994) ("It would be unrealistic to expect management to be

disciplined. Further, after school officials replaced the bus driver, no further bus problems were reported. This response satisfies Title VII, even though Jane and Janet were dissatisfied with it. Thus, even if the Fifth Circuit applied the incorrect legal standard, the ultimate disposition of the motion for summary judgment would remain the same: it would be granted, and Petitioner's claim would be dismissed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: August 15, 1996.

Respectfully submitted,

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aware of every impropriety committed by every low-level employee.").

Supreme Court, U.S.
FILED
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No. 96-4

In the Supreme Court of the United States

OCTOBER TERM, 1995

DEBRA ROWINSKY, NEXT FRIEND OF "JANE DOE" AND "JANET DOE," HER MINOR CHILDREN, ETC., PETITIONER

v.

BRYAN INDEPENDENT SCHOOL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a school district that receives federal financial assistance can be liable under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, when an elementary school student in the district is subjected to continual sexual harassment by other students and responsible officials of the school have notice of the harassment but fail to take appropriate corrective action.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-4

DEBRA ROWINSKY, NEXT FRIEND OF "JANE DOE" AND "JANET DOE," HER MINOR CHILDREN, ETC., PETITIONER

v.

BRYAN INDEPENDENT SCHOOL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case arises out of an action filed by petitioner, Debra Rowinsky, on behalf of her minor daughters, against respondent, the Bryan Independent School District. The complaint alleges, *inter alia*, that petitioner's daughters were discriminated against on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. Title IX prohibits discrimination on the basis of sex by recipients of federal financial assistance. 20 U.S.C. 1681. Petitioner alleges that her daughters were subjected to an unlawfully hostile environment through sexual harassment—including assaultive physical contact—by other students and that respondent, a recipient of federal financial assistance, was aware of the harassment but did not respond adequately to repeated complaints about the situation. The lower courts

ruled that, even assuming that to be true, respondent could not be held liable under Title IX because it did not take direct discriminatory action against petitioner's daughters and did not treat complaints of harassment differently based on the sex of the victim. Pet. App. A12-A21.

The United States Department of Education, Office for Civil Rights (OCR), has primary responsibility for the administrative enforcement of Title IX. See 20 U.S.C. 1682. The Department of Justice enforces Title IX in federal court in cases referred to it by OCR. OCR interprets Title IX as imposing liability on a recipient educational institution if the institution knew, or should have known, that a student was being subjected to hostile environment sexual harassment by other students and the institution failed to take appropriate corrective action. OCR has applied this interpretation in the course of its enforcement activities on numerous occasions since at least 1989, including in various Letters of Findings sent to fund recipients after investigation of complaints by OCR. Moreover, OCR interprets the statutory prohibition against race discrimination by federal fund recipients (set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, in the same statutory terms as are used in Title IX) to apply to peer racial harassment in similar circumstances and, in 1994, published a policy guidance setting forth that interpretation. On August 14, 1996, OCR issued a Title IX policy guidance regarding peer sexual harassment setting forth its long-standing interpretation.

STATEMENT

1. Petitioner Debra Rowinsky brought this action, as next friend, on behalf of her two minor daughters, Jane and

Janet Doe, who, during all relevant times, were students at Sam Rayburn Middle School, which is operated by respondent, the Bryan Independent School District. Pet. App. A2, B2. Respondent also operates the school buses that transported petitioner's daughters and other students between their homes and the school. Respondent receives federal financial assistance, *id.* at A24, and, therefore, is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which provides, in relevant part, that

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. 1681(a).

2. The courts below described much of petitioner's evidence in detail. That evidence shows that male students "physically and verbally abused" petitioner's two eighth-grade daughters on the school bus, Pet. App. B2, including swatting one of the girls on the bottom on a regular basis, *id.* at A2, B2, grabbing the girls' breasts, *id.* at A2, and reaching up the girls' skirts and grabbing their genital areas, *id.* at A3, B3. Although the girls complained to the bus driver "no fewer than eight times," he did not respond to the complaints. *Id.* at A2, B2. Repeated complaints by petitioner, her husband, and their daughters to numerous school and district officials never led to an adequate investigation or appropriate corrective action. See *id.* at A2-A5. Petitioner expands on that description, citing additional

record evidence. Pet. 2-14; see Pet. 3 n.4.[1] We rely on those statements for purposes of this brief.[2]

3. Petitioner brought this action against respondent and various school and district officials, alleging, *inter alia*, that her minor daughters had been subjected to discrimination on account of their sex, due to a hostile educational environment caused by sexual harassment, in violation of Title IX and its implementing regulations, 34 C.F.R. Pt. 106. Pet. App. A5-A6, B3-B4. Petitioner sought declaratory and injunctive relief, compensatory damages, and attorney's fees. *Id.* at A6. Petitioner contended that respondent's "insufficient action in response to Jane's and Janet's complaints of sexual harassment by the boys facilitated continuing abuse." *Id.* at B5.[3]

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[1] Petitioner cites evidence of peer sexual harassment against other students in the district that she alleges contributed to the hostile school environment, but which the decisions below did not cite. See Pet. 3 & n.4, 8-14 (*e.g.*, complaints by another middle school student that she suffered from a hostile sexual environment because of repeated sexual harassment on her school bus and inadequate response by school officials). Petitioner also cites the investigative report of the United States Department of Education's Office for Civil Rights (OCR) regarding petitioner's complaint, see note 3, *infra*, that describes additional evidence, such as interviews with other students, that corroborated the allegations by petitioner's daughters and that detailed sexually harassing conduct that had occurred elsewhere in the district.

[2] The district court correctly noted that, because it was ruling on respondent's motion for summary judgment, "[a]ll justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Pet. App. B5, citing *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[3] Petitioner also filed a complaint under Title IX with OCR. OCR investigated the case, recognizing it as a peer harassment case, and compiled an investigative report, pursuant to its authority under Title IX and 34 C.F.R. Pt. 106. OCR ultimately issued a letter confirming that respondent had demonstrated its willingness to resolve the serious

The district court granted respondent summary judgment on petitioner's Title IX claim. The court held that, in order to recover damages under Title IX, petitioner had to establish that respondent "intentionally discriminated" against her daughters on the basis of sex. Pet. App. B10, quoting *Doe* v. *Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (1993), reconsideration granted, No. C 93-00123 CW (N.D. Cal. July 22, 1996). The court ruled that "[i]t is not enough that [respondent] knew or should have known about sexual harassment at the School or did not effectively deal with such complaints." *Ibid.* The court found that petitioner's evidence failed to show that respondent "ever adopted any resolution or took any other action formally to adopt or implement" a policy of intentional sex discrimination," *ibid.*, or that respondent "dealt *less* severely with sexual harassment and misconduct directed toward girls than it did with sexual harassment and misconduct directed toward boys," *id.* at B12.[4]

4. The court of appeals affirmed. Pet. App. A1-A42. The court held that Title IX could not impose liability on

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allegations under investigation and to develop a plan to provide training for faculty, staff, and students, and that respondent was committing itself to a written agreement of corrective action to resolve the alleged Title IX violations. See Letter from George D. Cole, Acting Regional Civil Rights Director, Dep't of Education, to Dr. Sarah Ashburn, Superintendent, Bryan Independent School District (Dec. 7, 1993).

[4] The district court dismissed the claims against the school officials in their individual capacities and petitioner did not appeal that ruling. Pet. App. A6 n.6. Thus, the school district is the only respondent. *Ibid.* The district court granted respondent summary judgment on petitioner's substantive due process claim, *id.* at B5-B9, and dismissed petitioner's procedural due process and equal protection claims as subsumed by the Title IX claim and as unsupported by evidence, *id.* at B12-B15. Petitioner did not appeal those rulings and does not raise those claims before this Court.

respondent for the alleged hostile environment caused by sexual harassment because the alleged harassers were students and there were no "allegations that the school district itself directly discriminated based on sex." *Id.* at A2.

The court of appeals viewed the issue as whether a recipient of federal financial assistance can be held liable under Title IX "for sex discrimination when the perpetrator is a party other than the grant recipient or its agents." Pet. App. A7-A8. The court read the text of Title IX as not clearly indicating whether Title IX is limited "to the acts of grant recipients." *Id.* at A10-A11. It therefore looked to the scope and structure of Title IX, its legislative history, and the Department of Education's interpretation of Title IX.

With regard to the scope and structure of Title IX, the court concluded that, "[w]hile it is plausible that the condition imposed [on recipients] could encompass ending discriminatory behavior by third parties, the more probable inference is that the condition prohibits certain behavior by the grant recipients themselves." Pet. App. A13. The court read the legislative history of Title IX to "support[] limiting the statute to the practices of grant recipients," *id.* at A14, citing the fact that "both supporters and opponents" of the legislation "focused exclusively on acts by the grant recipients," *id.* at A15.

Finally, noting that the court owed "appreciable deference" to the interpretation of Title IX by the Department of Education's Office for Civil Rights (OCR), the court concluded that OCR's interpretation "is consistent with refusing to impose liability for the acts of third parties." Pet. App. A17 & n.20. The court pointed to OCR's regulation implementing Title IX, 34 C.F.R. 106.31, which addresses only acts by recipients. Pet. App. A17. The court also pointed to an August 31, 1981, policy memo-

randum by OCR concerning sexual harassment that focused on conduct by employees or agents of recipients and that left unresolved the issue of peer sexual harassment. *Id.* at A18. The court found that it was "no coincidence" that OCR left the issue unresolved because "[s]exual harassment by third parties is beyond the jurisdiction of the OCR unless the power of the school district is somehow implicated by the third party." *Id.* at A18 n.22.

The court acknowledged, but wholly discounted, the fact that OCR treats complaints of peer harassment as within its jurisdiction, has issued Letters of Findings setting forth its interpretation of Title IX as applying to peer sexual harassment, and has also published a policy guidance interpreting the analogous ban on race discrimination in Title VI of the Civil Rights Act of 1964 to apply to hostile environments caused by peer racial harassment. Pet. App. A19, citing 59 Fed. Reg. 11,448, 11,449 (1994). See also *id.* at A19-A20. The court concluded that a school district could be liable in a case of peer sexual harassment only if the school district "responded to sexual harassment claims differently based on sex." *Id.* at A21.[5] Because petitioner failed to allege facts to support such a claim, the court affirmed the district court's judgment.

Judge Dennis dissented, in relevant part. Pet. App. A22-A42. He relied on the Court's opinions in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986),

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[5] The court disapproved of incorporating the concept of hostile environment sexual harassment from Title VII of the Civil Rights Act of 1964 into a case of peer harassment under Title IX. The court pointed to the lack of an agency relationship between the school and the harasser and to its view that there is not a "power relationship" between the harasser and the victim, so that "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker." Pet. App. A8 n.11.

to conclude that "a student subjected to severe sexual harassment by other students in the school environment may recover for damages sustained thereby from a federally funded educational institution if its board had knowledge of the harassment and failed to take appropriate corrective action." Pet. App. A32.

ARGUMENT

The court of appeals' ruling places virtually all claims of an unlawful hostile environment based on student-on-student sexual harassment beyond the reach of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. Such categorical exclusion of those cases cannot be squared with the text or purpose of Title IX. Although there will continue to be issues to resolve on a case-by-case basis (*e.g.*, whether the harassment is severe or pervasive enough to constitute a hostile environment; whether the school district was on notice of the harassment), the Court should grant review in this case to reverse the lower court ruling that would completely preclude all such claims, regardless of the severity or pervasiveness of the alleged conduct or the school district's ability to respond to it.

The court of appeals misinterpreted Title IX when it held that a school district that receives federal financial assistance cannot be held liable under Title IX for its failure to remedy a hostile educational environment caused by pervasive sexual harassment of students by other students, despite the fact that the district knew about the harassment and failed to take adequate corrective action. Its decision conflicts with decisions of other lower federal courts and is contrary to the policy and enforcement practices of the United States Department of Education's Office for Civil Rights (OCR), which has primary responsibility for enforcing Title IX. 20 U.S.C. 1682.

The major flaw in the court of appeals' reasoning is its view that to hold a school district liable in this type of case would be to hold it liable for the conduct of students who are not its agents. Imposing liability, under Title IX, on an educational institution that fails to act, despite its knowledge of severe or pervasive sexual harassment of students by other students, does not impose liability on that school for the student's actions. Rather, the institution is liable for its *own* conduct in knowingly allowing a discriminatory environment to continue, and thus failing to fulfill its duty to protect sexually harassed students from being "subjected to discrimination under" (20 U.S.C. 1681(a)) the school district's educational system. Allowing such sexual harassment to continue alters the conditions of the victim's education, on account of her sex, and may impede the student's ability to participate in, or benefit from, the school district's educational system.

If left unreviewed, the court of appeals' decision will directly impede the efforts of OCR to enforce Title IX in the Fifth Circuit and will create doubt nationwide about the correctness of OCR's interpretation of Title IX's prohibition of sex discrimination in education. Such discrimination may have especially profound consequences. As a panel of the Eleventh Circuit has recently stated, "[t]he damage caused by sexual harassment * * * is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school." *Davis* v. *Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193 (1996), vacated on grant of rehearing en banc, No. 94-9121, 1996 WL 438188 (Aug. 1, 1996).

1. a. The court of appeals' ruling is inconsistent with this Court's decisions regarding liability under Title IX and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court reversed the dismissal of a case in which a plaintiff sought damages based on her allegations that her school district violated Title IX's prohibition against sex discrimination. Plaintiff alleged that she was subjected to continual sexual harassment by a teacher at school, that the district knew of the harassment, and that the district took no action to stop it. *Id.* at 63-64. The Court ruled that the case should not have been dismissed because a damages remedy is available in such an action to enforce Title IX. The Court thereby recognized that the implied cause of action against a fund recipient for damages under Title IX includes actions based on allegations of hostile environment sexual harassment at school. *Id.* at 76.

The *Franklin* Court relied on *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), a Title VII case in which the Court held that a supervisor discriminated on the basis of sex when he created a hostile environment for a subordinate at work by sexually harassing her. *Vinson* explained that "hostile environment" cases under Title VII are rooted in the fact that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65, citing EEOC Guidelines, 45 Fed. Reg. 74,676 (1980). For sexual harassment to be actionable under Title VII, the harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 477 U.S. at 67, quoting *Henson* v. *City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). Such a racially or sexually hostile environment is an "arbitrary barrier to sexual equality at the

workplace," *id.* at 66-67, quoting *Henson*, 682 F.2d at 902. *Id.* at 66; see also *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993) (reaffirming *Vinson*'s holding that the prohibition on unlawful disparate treatment in employment precludes "requiring people to work in a discriminatorily hostile or abusive environment").

By applying the Title VII hostile environment principle in a Title IX case, the *Franklin* Court recognized that Title IX affords students a right to attend school in an environment free from discriminatory intimidation, ridicule and insult based on sex. Sexual harassment that is sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment is actionable under Title VII. Similarly, sexual harassment that is sufficiently severe or pervasive to affect a student's ability to participate in, to benefit from, or to be free of discrimination under a school district's educational system is actionable under Title IX. Sexual harassment that creates a hostile school environment for members of one sex is an "arbitrary barrier to sexual equality" in the school.

b. When a student is subjected to a hostile educational environment caused by pervasive sexual harassment, she suffers from discrimination based on sex regardless of whether the harasser is a teacher or a fellow student. It is just as true in the school context as it is in employment that an environment "heavily polluted with discrimination" may "destroy completely the emotional and psychological stability" of the targeted victims. See *Vinson*, 477 U.S. at 66, quoting *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (discussing a racially hostile work environment), cert. denied, 406 U.S. 957 (1972). A discriminatorily abusive school environment, "even one that does not seriously affect [students'] psychological well-being, can and often will detract from [students' school] performance,

discourage [students] from remaining [in school programs or activities], or keep them from advancing in their [school] careers." *Harris*, 114 S. Ct. at 370-371 (making those observations in context of the workplace). "[E]ven without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a [school] environment abusive to [students] because of their * * * gender" offends Title IX's broad rule of educational equality. *Id.* at 371.

Imposition of Title IX liability on school districts that know of such discrimination and do not respond to stop it is consistent with *Franklin*. In that case, the plaintiff had alleged that, "though they became aware of and investigated [the teacher's] sexual harassment of [the plaintiff] and other female students, teachers and administrators took no action to halt it and discouraged [the plaintiff] from pressing charges." 503 U.S. at 63-64. In at least one other case, the Court has proceeded on the assumption that liability for damages due to sexual harassment can be imposed on an entity that knowingly permits sexual harassment by a third party to take place on its premises. In *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), the Court assumed that the case presented a valid Title VII claim for damages against an employer based on the employer's having inadequately responded to complaints from one employee that another employee (not her supervisor) had sexually harassed her at work. *Id.* at 1489. Employer liability in *Landgraf* was based on the theory that an employer has a duty, under Title VII, to take what measures it reasonably can to stop harassment at work by persons over whom the employer exercises some control. See *Harris*, 114 S. Ct. at 372 (Scalia, J., concurring) (describing Title IX hostile environment cases as requiring a determination whether "sex-related conduct engaged in

(*or permitted by*) an employer is egregious enough to warrant an award of damages") (emphasis added).

2. The court of appeals below erroneously ruled that the Title VII principle that defines discrimination to include hostile environment sexual harassment should not be employed in situations involving student-on-student harassment under Title IX. Pet. App. A9 n.11. This decision conflicts with the weight of authority in the lower courts. The court below acknowledged that the Eleventh Circuit had reached the opposite conclusion in *Davis* v. *Monroe County Board of Education*, 74 F.3d 1186 (1996).[6] See Pet. App. A7 n.8. In *Davis*, the court held that

> when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has "be[en] denied the benefits of, or be[en] subjected to discrimination under" that educational program in violation of Title IX, 20 U.S.C. § 1681(a). Just as a working woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor*, 477 U.S. at 67, * * * a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.

74 F.3d at 1194. The *Davis* court looked to the principles applied in Title VII cases involving sexual harassment by a co-worker, and held that an educational institution would

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[6] In dissent below, Judge Dennis expressly agreed with the analysis of the *Davis* panel. Pet. App. A22 n.1. After the decision below, the Eleventh Circuit vacated the panel opinion in *Davis* and granted rehearing en banc. No. 94-9121, 1996 WL 438188 (Aug. 1, 1996).

be liable for a hostile environment created by students if the institution "knew or should have known of the harassment in question and failed to take prompt remedial action." *Id.* at 1195, quoting *Henson*, 682 F.2d at 905 (applying same in Title VII case). A school's liability in such a case is not because of the direct acts of its officials, but because of their "failure to take action to stop the offensive acts of those over whom the officials exercised control." *Id.* at 1193.[7]

The court below also acknowledged that its view conflicts with the reasoning implicit in opinions of other circuits. Pet. App. A7 n.8. The Second Circuit has recognized, for example, that, "in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." *Murray* v. *New York Univ. College of Dentistry*, 57 F.3d 243, 249 (1995) (interpreting *Franklin*). The *Murray* court borrowed from Title VII standards and concluded that the institution would be liable for sexual harassment of a student by a patient if the institution "either provided

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[7] The courts of appeals rely on a similar theory of liability in cases under Title VII where employers are held liable for a hostile work environment created by harassment of a worker by a co-worker—it is the employer's failure to remedy the hostile environment that renders it liable. See, *e.g.*, *Ellison* v. *Brady*, 924 F.2d 872, 881-882 (9th Cir. 1991); *Hall* v. *Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Snell* v. *Suffolk County*, 782 F.2d 1094 (2d Cir. 1986). See also NOW Legal Defense and Education Fund *et al.* Amicus Br. 11 & n.7, 12 & n.8 and cases cited therein (collecting cases regarding employer liability for failing to remedy a hostile work environment where it was created by non-supervisory employees or third parties such as customers); *Davis*, 74 F.3d at 1193 n.6 (collecting cases to the same effect).

no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Ibid.* (citation omitted). Similarly, in *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1988), the First Circuit reviewed a "mixed employment-training" (*id.* at 897) case that was brought under Title IX, and relied on Title VII principles to hold that, where harassment by fellow residents in a surgery training program creates a hostile environment, the educational institution is liable under Title IX if "an official representing the institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it." *Id.* at 901. See also *Brown* v. *Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 529 (1st Cir. 1995), cert. denied, 116 S. Ct. 1044 (1996).[8]

Numerous district courts have expressly recognized that educational institutions may be held liable under

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[8] Other courts of appeals have also indicated that they would hold that Title IX imposes liability on educational institutions that fail to respond appropriately to known hostile environments caused by peer sexual harassment. See *Doe* v. *Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995) (granting a school official qualified immunity against a Title IX peer sexual harassment claim because, in the court's view, it was not clearly established prior to the Court's opinion in *Franklin* that a school counselor had a duty to prevent peer sexual harassment, but expressly stating that, if the official "engaged in the same conduct today, he might not be entitled to qualified immunity"); *Clyde K.* v. *Puyallup Sch. Dist.*, 35 F.3d 1396, 1401 (9th Cir. 1994) ("school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment"); cf. *Seamons* v. *Snow*, 84 F.3d 1226 (10th Cir. 1996) (testing the sufficiency of a peer sexual harassment Title IX claim by application of the five-step proof standard set forth in *Davis*).

Title IX for a hostile environment caused by students. These cases have frequently based decision on application of Title VII principles.[9] For example, in *Bosley* v. *Kearney R-1 School District*, 904 F. Supp. 1006, 1022 (W.D. Mo. 1995), the district court, utilizing principles developed under Title VII, held that a recipient educational institution could be liable under Title IX for hostile environment sexual harassment created by student harassers if the institution knew of the harassment and intentionally failed to take proper remedial action. *Id.* at 1023. In *Oona R.-S.* v. *Santa Rosa City Schools*, 890 F. Supp. 1452, 1466-1470 (N.D. Cal. 1995), the court analyzed whether the plaintiff had alleged a deprivation of rights under Title IX that was actionable against a state actor under 42 U.S.C. 1983. The court concluded that the plaintiff had stated such a claim because

> the right created by Title IX may be violated when female students are subjected to sexual harassment by their male peers at school and school officials discriminate against the female students on the basis of sex in encouraging or failing to appropriately respond to such harassment. Such discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male

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[9] In a pre-*Franklin* decision involving alleged harassment by a teacher, one district court held that Title IX did not apply to cases of hostile environment sexual harassment. *Bougher* v. *University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D. Pa.), aff'd on other grounds, 882 F.2d 74 (3d Cir. 1989). In affirming, the Third Circuit expressly declined to decide the question of Title IX's applicability. 882 F.2d at 77. A district court in the Fifth Circuit has held, post-*Franklin*, that a student cannot bring a hostile environment claim under Title IX. *Garza* v. *Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994).

> students, or the failure to take adequate steps to deter or punish peer harassment.

890 F. Supp. at 1469, citing *Doe*, 830 F. Supp. at 1575-1576. See also *Mennone* v. *Gordon*, 889 F. Supp. 53, 55, 58 (D. Conn. 1995) (stating that school board was appropriate defendant in a Title IX case alleging peer sexual harassment about which school officials knew, but did nothing); cf. *Moire* v. *Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360, 1366-1370 (E.D. Pa. 1985) (recognizing that Title IX would be violated if university officials sanctioned a harassing environment based on sex), aff'd, 800 F.2d 1136 (3d Cir. 1986) (Table).

One recent district court expressly declined to follow the court of appeals' ruling in the instant case, stressing the flaws underlying its analysis. *Doe* v. *Petaluma City School District*, No. C 93-00123 CW (N.D. Cal. July 22, 1996) (on grant of reconsideration motion):[10]

> *Rowinsky* is manifestly based on a fundamental misunderstanding of the nature of this type of claim. The majority opinion continually refers to the plaintiff's claim as being based on the conduct of the peer harassers rather than on the action and inaction of the school district, and its reasoning is based upon this characterization. * * *
>
> The actual thrust of this type of claim, is to impose liability on the school district based not on the harassing conduct of its students, but on the district's *own* conduct of knowingly permitting the discriminatory

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[10] The courts below relied on the earlier opinion of the *Petaluma* court, see 830 F. Supp. 1560, 1576 (1993), that was subsequently vacated on grant of a reconsideration motion (July 22, 1996).

> hostile and abusive environment to continue and to inflict an ongoing injury on its female students.

Slip op. 13. The court concluded that the Title IX recipient would be liable for failing to take appropriate remedial action in response to student-on-student sexual harassment that caused a hostile educational environment where the recipient "actually knew, or should in the exercise of its legal duties have known, of the harassment." *Id.* at 26-27. See also *Burrow* v. *Postville Community Sch. Dist.*, No. C94-1031, 1996 WL 361126, at *8-*9 (N.D. Iowa June 17, 1996) (rejecting *Rowinsky* and holding that student may bring a Title IX action for damages against a school district "for its knowing failure to take appropriate remedial action in response to the hostile sexual environment created by students").

3. The ruling below is inconsistent with the interpretation and enforcement practices of OCR. The court of appeals rejected the interpretation of Title IX that OCR has applied in its enforcement practices, as evidenced by its Letters of Findings to recipients in particular cases. Pet. App. A19. In 1989, OCR found a school district to be in violation of Title IX based on its failure to stop peer sexual harassment, stating that "[h]arassment of a student because of his or her sex may have the effect of depriving that student of benefits of or subjecting them to different treatment on the basis of sex. * * * A district which is aware that its students are being subjected to sexual harassment has a duty under Title IX to take prompt and effective action to stop it." Letter from John E. Palomino, Regional Civil Rights Director, Dep't of Education, to Charles Cadman, Superintendent, Petaluma City School District 3 (May 5, 1989). OCR repeated this interpretation in several subsequent Letters of Findings and stated in 1992 that, "[w]hen individuals who are partic-

ipating in a program or activity operated or sponsored by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others. * * * If the harassment is carried out by non-agent students, the institution may * * * be found in non-compliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment." Letter from John E. Palomino, Regional Civil Rights Director, Dep't of Education, to Dr. John Maguire, President, The Claremont Graduate School 2 (July 24, 1992). On August 14, 1996, OCR issued a draft agency guidance setting forth the standards it applies when investigating peer sexual harassment claims. OCR is publishing a notice to invite comments concerning the clarity and completeness of this guidance. (Copies of that guidance, as well as the cited Letters of Findings, have been lodged with the Court and served on the parties.)[11] OCR's final policy guidance should merit deference by the Court. See *Smiley* v. *Citibank (South Dakota)*, 116 S. Ct. 1730 (1996).

OCR's interpretation is consistent with its interpretation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. Title VI prohibits discrimination by federal

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[11] Contrary to the suggestion of the court of appeals (Pet. App. A17-A18), OCR's general regulation implementing Title IX (34 C.F.R. 106.31) and its earlier policy memorandum regarding sexual harassment (see Memorandum from Director of Litigation, Enforcement, and Policy Service (Aug. 31, 1981)) do not foreclose OCR from developing an enforcement policy or issuing a guidance, under Title IX, on peer sexual harassment. The initial regulation's general prohibition against sex discrimination does apply to hostile environment sexual harassment, it simply does not use those terms, and the 1981 policy memorandum left open the issue of peer sexual harassment under Title IX, without expressing any views on the appropriateness of imposing liability on recipients in any particular circumstances.

fund recipients (including educational institutions) on the basis of race, using the same statutory terms used in Title IX.[12] In 1994, OCR issued a policy guidance, 59 Fed. Reg. 11,448-11,454, stating that a recipient "has subjected an individual to different treatment on the basis of race" in violation of Title VI "if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice." *Id.* at 11,449. OCR further explained that, "[u]nder this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment." *Ibid.* This is the same liability theory that OCR has applied under Title IX and that is set forth in its draft peer sexual harassment guidance.

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[12] Title VI states, in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 96-4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DEBRA ROWINSKY, as next friend of
"JANE DOE" and "JANET DOE," her minor children,
and for all those similarly situated,

Petitioner

V.

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REASONS FOR SUPPLEMENTING THE BRIEF

Petitioner respectfully files this Supplemental Brief, pursuant to Rule 15(8) of this Court, to call the Court's attention to three new decisions, interpreting Title IX in similar factual contexts as the case brought forward here by Petitioner, but which arrive at different results than Petitioner's case. One of the opinions revises an earlier one which Petitioner cited at length in her petition for certiorari.

1. The three recent district court decisions further demonstrate the need for this Court's guidance to bring national uniformity in applying Title IX standards to peer hostile environment sexual harassment claims in schools.

On June 28, 1996, Mrs. Debra Rowinsky, on behalf of her two daughters, submitted a petition for writ of certiorari to this Court on the question of whether a school district violates Title IX if it intentionally fails to prevent or curtail severe hostile environment peer sexual harassment of which it is aware.

This supplement advises the Court of three recent decisions relevant to Mrs. Rowinsky's petition. Doe v. Petaluma City School District, revised on rehearing ("Petaluma II"),[1] Burrow v. Postville Community School District,[2] and Bruneau v. South Kortright Central School District[3] all address a school's Title IX liability for hostile environment peer sexual harassment. These cases further illustrate Petitioner's assertion of interpretive confusion around the country, and profound disagreement with the

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[1] No. C-93-00123-CW (N.D. Cal. July 22, 1996). Because the district judge did not release her decision to WestLaw, Petitioner includes this case in the appendix to this supplement.

[2] No. C-94-1031, 1996 WL 361126 (N.D. Iowa June 10, 1996).

[3] ___ F.Supp. ___, 1996 WL 434390 (N.D. N.Y. July 25, 1996).

Rowinsky analysis below, of which Petitioner also complains. This is all the more true in view of the substantial revision of the Petaluma trial court's ruling after Mrs. Rowinsky filed her petition.

a. Petaluma II

Neither Petaluma II, released on July 22, 1996, nor Bruneau, released on July 25, 1996, was available for Mrs. Rowinsky's original petition. Petitioner received notice of Burrow on August 5 from counsel of one of the amici in this case. The Northern District Court of Iowa decided Burrow on June 17, 1996; Petitioner was unaware of Burrow at the time she submitted her petition on June 28, 1996.

These cases have threefold importance. First, they emphasize continuing confusion in courts around the country in interpreting Title IX as it applies to a school's responsibility to address serious peer sexual harassment. Second, the cases demonstrate the trend of courts around the nation to move away from or discount the narrow logic applied by the Fifth Circuit Court of Appeals in this case, Rowinsky v. Bryan Independent School District.[4] Finally, they reflect a discernable movement toward the Eleventh Circuit's rationale in Davis v. Monroe County Board of Education,[5] which the Fifth Circuit summarily rejected in Rowinsky below, by way of a footnote.

In Petaluma II, the Northern District Court of California reconsidered the discriminatory intent standard it had first articulated in Petaluma I.[6] The district judge sought to clarify the relationship between the intentional discrimination standard that this Court utilized to analyze a high school

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[4] 80 F.3d 1006 (5th Cir. 1996).

[5] 74 F.3d 1186 (11th Cir. 1996).

[6] 830 F.Supp. 1560 (N.D. Cal. 1993) ("Petaluma I").

student's Title IX hostile environment claim in Franklin v. Gwinnett County Public Schools[7] and the Title VII standard for hostile environment claims in the employment context.[8]

Originally, in Petaluma I, the trial judge had determined that the Title VII standard of "knew or should have known" was inapplicable to a Title IX claim, requiring, instead, a showing of actual discriminatory intent on the part of an agent of the school district.[9] The district judge, however, reconsidered and revised the earlier holding, in light of Davis[10] and Bosley v. Kearney R-1 School District.[11] Petaluma II noted Bosley and Davis's adoption of different standards from Petaluma I and decided that schools had Title IX liability when officials intentionally failed or refused to address an existing hostile environment, known to them.

In Davis, the Eleventh Circuit, unlike the Court of Appeals below, found it appropriate to extend Title VII principles to Title IX cases in light of this Court's mandate that Title IX be "given a sweep as broad as its language"[12] and the Office for Civil Rights' use of Title VII standards in interpreting and enforcing Title IX.[13] Bosley ruled that Title VII provided the most appropriate standards for interpreting Title IX and applied the standard of "knew or should have known of the hostile environment and took no or insufficient

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[7] 503 U.S. 60 (1992).

[8] No. C 93-00123-CW at 8.

[9] 830 F.Supp. at 1575.

[10] 74 F.3d 1186.

[11] 904 F.Supp. 1006 (W.D. Mo. 1995).

[12] Davis, 74 F.3d at 1192 (citations omitted).

[13] Id.

remedial action"[14] for imposing liability on a school for failure to remedy peer sexual harassment.

b. Burrow v. Postville Community School District

In Burrow, the trial judge concluded that "the Supreme Court's utilization of its Title VII case law to interpret Title IX in Franklin strongly indicates that the Title VII precedent is appropriate for analysis of hostile environment sexual harassment claims."[15]

The Burrow court slightly modified Davis's version of the elements of a claim, omitting constructive notice as sufficient for stating a claim:

> (1) that the plaintiff is a member of a protected group; (2) that the plaintiff was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of the plaintiff's education and create an abusive educational environment; and (5) that the educational institution knew of the harassment and intentionally failed to take proper remedial measures because of the plaintiff's sex.[16]

c. Bruneau v. South Kortright Central School District

Similarly, Bruneau held that a plaintiff could maintain a Title IX action by showing "that the school and/or school board received actual notice of the sexual harassing conduct

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[14] 904 F.Supp. at 1023.

[15] 1996 WL 361126 at *9.

[16] Id. at *11.

and failed to take action to remedy it."[17] The Bruneau trial court based its decision, in part, on the relationship between Title VII and Title IX. Citing Davis and Franklin, the trial judge found that a "student should have the same protection in school that an employee has in the workplace."[18]

Looking to Title VII's requirement that employers take steps to assure their employees an environment free of sexual harassment, the district court found that "in the Title IX context, when an educational institution fails to take steps to remedy peer-on-peer sexual harassment, it should be held liable to the harassed student for that discriminatory conduct."[19]

2. Three of the new district court decisions reject the Fifth Circuit's holding in Rowinsky.

Petaluma II and Burrow declined to follow the Fifth Circuit's analysis below because "it yields results inconsistent with the body of discrimination law."[20] Bruneau impliedly rejected Rowinsky because it applied the Title VII analysis adopted in Davis to a plaintiff's Title IX claim.[21]

The Petaluma II court emphasized that, under Rowinsky, no legal remedy exists when a school allows a pervasive and persistent sexually hostile environment to flourish. Further, Petaluma II found that "this decision [Rowinsky] is manifestly based on a fundamental misunder-

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[17] Bruneau, 1996 WL434390 at *7.

[18] Id. (citations omitted).

[19] Id. at *6.

[20] Doe v. Petaluma, No. C 93-00123 CW at 12.

[21] Bruneau, 1996 WL 434390 at *9, citing Davis, 74 F.3d at 1194.

standing of the nature of this type of claim."[22]

According to Petaluma II, the fundamental purpose of a Title IX peer hostile environment claim is to impose liability on the school district when it permits the discriminatory hostile and abusive environment to continue and thus inflict an ongoing injury on its female students. The district judge criticized the Rowinsky ruling for incorrectly focusing on the conduct of peer harassers while ignoring the school's duty under Title IX to prevent or curb harassing behavior.[23]

Petaluma II supported the Bosley and Davis decisions to utilize Title VII standards and principles for purposes of Title IX cases.[24] Petaluma II essentially strengthens prevailing case law, finding Title VII as the most useful and appropriate analogue in Title IX cases: "With the benefit of hindsight, it now appears that the Davis approach most closely carries out the Franklin holding."[25]

Burrow also disregarded Rowinsky and approved Franklin and Davis's standard for evaluating hostile environment peer sexual harassment claims. In adopting Franklin and Davis, Burrow rejected the Fifth Circuit's narrow reading of Title IX liability for a school's failure to prevent or curtail peer sexual harassment, expressed in Rowinsky.

Bruneau also refused to narrowly construe Title IX. The defendants in Bruneau asserted arguments similar to the Fifth Circuit's findings in Rowinsky. First, the school district declared that Title VII standards are not applicable to a Title

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[22] Id. at 13.

[23] Id.

[24] Id.

[25] No. C-93-00123-CW at 15.

IX claim.[26] The school also argued that, to establish Title IX liability, the plaintiff must show that the district responded differently to claims of sexual harassment from male and female students.[27] Unlike this case below, neither theory survived the district court's analysis.

CONCLUSION

Petaluma II, Burrow, and Bruneau strengthen Petitioner's reasons for urging this Court to review the decision below. They emphasize the need for this Court to resolve the serious decisional conflicts among the appellate and district courts as to whether Title IX applies to peer hostile environment sexual harassment in elementary and secondary schools.

Moreover, these cases demonstrate the need for uniformity in interpreting Title IX as it applies to a school's responsibility to address hostile environment peer sexual harassment. They also indicate that Rowinsky is out of step with the direction of other courts, which means young women in the Fifth Circuit have much less protection against sexual harassment in school, than do other young women around the nation, outside the Fifth Circuit. This Court should correct this lack of uniformity and correct this manifest injustice.

Because of the national impact of this case and the need to achieve decisional uniformity, Petitioner prays that the Court accept this supplemental brief and grant her petition for certiorari to the Court of Appeals for the Fifth Circuit.

Dated: August 16, 1996.

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[26] Bruneau, 1996 WL 434390 at *5; see Rowinsky, 80 F.3d at 1011.

[27] Bruneau, Supra n.26; cf. Rowinsky, 80 F.3d at 1016.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANE DOE, a Minor, by and through her Guardian ad Litem, JOHN DOE,

Plaintiff,

v.

PETALUMA CITY SCHOOL DISTRICT, AND PETALUMA JOINT UNION HIGH SCHOOL DISTRICT, RICHARD HOMRIGHOUSE, and ROES 1 through 50, inclusive,

Defendants.
_____/

No. C 93-00123 CW

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff's Motion for Reconsideration was heard by this Court on April 26, 1996. Having considered the papers filed by the parties and oral argument on the motion, and good cause appearing, the Court hereby GRANTS the motion as follows.

BACKGROUND

Plaintiff filed this action on January 11, 1993 alleging that Defendants failed to stop sexual harassment inflicted on her by her peers while she was a student at Kenilworth Junior High School. On August 30, 1993, on Defendants' motion to dismiss the First Amended Complaint, this Court, the Honorable Eugene F. Lynch presiding, held that Title IX, 20

U.S.C. §§ 1681 et seq., prohibits hostile environment sexual harassment, and that money damages are available in a private action to enforce Title IX upon proof of "intentional discrimination on the basis of sex by an employee of the educational institution." Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571 (N.D. Cal. 1993)[1] ("Petaluma I").

The Court specified that, in proving intentional discrimination, "it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it," because that standard, applicable to Title VII claims for sexual harassment in the workplace, was not "the equivalent of 'discriminatory animus,'" but rather was "in essence a negligence standard." Id. The Court explained what Plaintiff would be required to prove under its ruling as follows:

> [T]he school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex. The school's failure to take appropriate action, as alleged in plaintiff's complaint, could be circumstantial evidence of intent to discriminate. Thus a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex.

Id. at 1576.

On March 11, 1996, the Court granted Plaintiff leave

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[1] Citation services disagree regarding the subsequent history of this case. A ruling from a later proceeding on an amended complaint was reversed by Doe v. Petaluma City Sch. Dist., 54 F. 3d 1447 (9th Cir. 1995).

to move for reconsideration of the above order pursuant to Civil Local Rule 7-9(a) in light of the developing case authority in this rapidly changing area of the law.

DISCUSSION

1. Standard for Reconsideration

Reconsideration should be granted only where there has been an intervening change of law or fact, new evidence or authority not previously available in the exercise of reasonable diligence has been discovered, or reconsideration is necessary to correct a clear error of law or a manifest injustice. School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F. 3d 1255, 1263 (9th cir. 1993) Cert. denied, 114 S.Ct. 2742 (1994)); Civil L.R. 7-9(b). As this Court noted in its order of March 11, 1996 granting leave to move for reconsideration, several new cases on school district liability under Title IX for student-on-student harassment have been decided since this Court's order of August 30, 1993. In addition, there is new authority in related areas of discrimination law, including Title VII law, which are informative here. As the Ninth Circuit explicitly recognized in 1991, "sexual harassment is a rapidly expanding area of the law." Ellison v. Brady, 924 f.2d 872 (9th Cir. 1991). This remains as true today as it was five years ago.

Defendants argue that this Court should refrain from reconsidering its prior decision under the doctrine of the law of the case. However, as Defendants recognize, "law of the case" refers only to the practice of courts not to reopen a decided issue except for a cogent reason, and does not circumscribe a court's authority to reconsider an interlocutory ruling when good cause exists to do so. Messinger v. Anderson, 225 U.S. 436, 444 (1912). Good cause exists here to reexamine the issues raised in this case.

2. Intentional Discrimination

At issue in this motion is the standard of liability for

damages under Title IX applicable to a federally funded school district when a sexually harassing hostile environment in a school allegedly harms a student. The availability of the remedy of money damages for violation of Title IX is based on the Supreme Court's decision in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992). The issue therefore turns on what the Supreme Court meant when it held that monetary damages could be awarded under Title IX against a recipient school district, consistent with the limitations on Spending Clause statute remedies, in cases of "intentional discrimination." Id. at 74-75.

In Franklin, the alleged hostile environment arose from the sexual harassment of a student by her teacher. The plaintiff sued the school district for damages under Title IX, claiming that the school district intentionally discriminated against her. The complaint alleged that a teacher engaged in ongoing sexual harassment and abuse, and that other teachers and administrators, although they were aware of the harassment, took no action to halt it. The district court dismissed the complaint on the grounds that Title IX does not authorize damages, and the appellate court affirmed.

The Supreme Court reversed, relying on the general presumption that where legal rights are violated and a federal statute provides for a general right to sue for the violation, the federal courts may use any available remedy to right the wrong. Franklin, 503 U.S. at 66. The defendant argued that this presumption should not apply because Title IX was enacted pursuant to Congress' Spending Clause power. The Court rejected this argument, noting that while in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28-29 (1981), the Court had limited remedies for unintentional violations of statutes promulgated under the Spending Clause statutes, this principle did not apply to intentional violations. Id. at 74. The Court explained that the reason not to permit

monetary damages for an unintentional violation is that the recipient of federal funds lacks notice that it will be liable for a monetary award. Id. In contrast, however,

> This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Id. at 74-75. Therefore, the Court held, a damages remedy was available against the school district.

The Franklin Court did not define or analyze "intentional discrimination." It was clear enough that a claim of "intentional discrimination" was at issue there, in that the plaintiff specifically alleged "intentional discrimination" and the lower courts characterized the plaintiff's claim as one of "intentional discrimination."

Thus, it is not clear how the Court meant the "intentional discrimination" standard it set in Franklin to relate to the standard for liability for hostile work environment sexual harassment under title VII. The Court gave conflicting signals on this point. On one hand, the Franklin Court expressly refused to consider whether the standards and remedies of Title VII should be directly applied to Title IX cases. 503 U.S. at 65, n.4. On the other hand, in characterizing the plaintiff's claim as one for "intentional discrimination," the Court cited without explanation to Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), a hostile environ-

ment case arising under Title VII. 503 U.S. at 75.

To further complicate matters, the Meritor Court had held that employers are not "always automatically liable for sexual harassment by their supervisors" and instructed the lower courts to look to agency principles for guidance in formulating a rule on employer liability. 477 U.S. at 72. Yet the Franklin Court, while relying on Meritor, made no mention on agency principles and gave no explanation of the connection between the act of the teacher in sexually harassing a student, which it characterized as intentional discrimination, and the liability of the school district for intentional discrimination.

The Franklin Court must have been aware that the appellate courts had fashioned a test for Title VII employer liability pursuant to the Court's instructions in Meritor. Under that test, an employer is liable for the existence of a hostile environment in its workplace only if the employer failed to take prompt remedial action after the employer actually knew or should have known of the existence of the hostile environment. See, e.g., EEOC v. Hacienda Hotel, 881 f.2d 1504, 1515-16 (9th Cir. 1989).

The facts alleged in Franklin would have met that test, for the plaintiff alleged that teachers and administrators actually knew of the harassment in the school but failed to do anything to remedy it. However, the Franklin Court did not refer to or expressly rely upon that knowledge and inaction when characterizing the plaintiff's claim as one for intentional discrimination.

Yet another layer of uncertainty is imposed by the context in which the Franklin Court raised the concept of intentional discrimination. That context was a discussion of whether the recipient district had sufficient notice of its potential liability to warrant imposition of money damages under a Spending Clause statute. The Supreme Court had

previously held in a Title VI action, under the principle expressed in Halderman, that monetary damages should not be awarded under Title VI for unintentional disparate impact discrimination. Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 597 (1983) (layoffs based on facially neutral "last-hired, first-hired" policy, which had disparate impact due to facially neutral entry examinations did not support money damages under Title VI). Justice White, announcing the judgment of the Court,[2] explicitly noted that the holding that damages were not available for unintentional discrimination based on disparate impact left open the issue of whether money damages would be appropriate in cases of "intentional discrimination." Id. Thus, while not explicitly defining "intentional discrimination," Justice White implied that it is discrimination other than that based on disparate impact. This section of Justice White's opinion was joined by Justice Rehnquist.

In addition, the dichotomy between intentional discrimination and discrimination based on disparate impact was also implicit in the concurrences and dissents of Justices

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[2] There was no majority opinion due to the split of opinions on the issues presented. Justice White concluded, as did Justice Marshall, that the appellate court erred in requiring proof of discriminatory intent to establish a violation of Title VI; Justices Stevens, Brennan and Blackmun also found error in this requirement, reasoning that while Title VI itself requires intentional discrimination, the regulations promulgated thereunder incorporating a disparate impact standard are valid. However, Justice White concluded, as did Chief Justice Burger and Justices Powell, Rehnquist and O'Connor, that the judgment of the appellate court should nevertheless be affirmed. Justices White, Rehnquist and O'Connor reached this conclusion on the ground that compensatory relief is not available under Title VI in the absence of discriminatory intent, Justice Powell and Chief Justice Burger on the ground that there is no private right of action under Title VI.

O'Connor, id. at 613, Marshall, id. at 616, and Stevens, Brennan and Blackmun, id. at 645. Thus, a majority of the Guardians Court impliedly defined "intentional discrimination" as discrimination other than disparate impact discrimination. However, it is not clear whether the Franklin Court intended the phrase "intentional discrimination" to have the same meaning as that same phrase in the Guardians Court's intentional discrimination/disparate impact dichotomy.

This Court, in its order of August 30, 1993, now under reconsideration, was acutely aware of the lack of clarity in Franklin regarding the relationship between the intentional discrimination standard used there and the Title VII standard for hostile environment claims. This Court resolved the conflicting clues by determining that the Title VII standard was inapplicable to a Title IX claim, and that in its place was a requirement for actual discriminatory animus on the part of an agent of the school district:

> Although the Franklin Court refused to address the question of whether Title IX's prohibitions and remedies are co-extensive with Title VII's, the implication of the Court's opinion is that they are not. Although not expressly stated in the opinion, the rule laid down by Franklin appears to be that, under Title IX, damages are available only for intentional discrimination but respondeat superior liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so.

Petaluma I, 830 F. Supp. at 1575.

It must be noted that the Petaluma I test is in some cases more stringent, and in other cases more lenient, than the Title VII standard for entity liability for hostile environment. In the case of intentional harassment by a non-supervisory

agent of the entity, strict liability would be imposed on the institution under the Petaluma I test, while liability would not be imposed under Title VII in the absence of the entity's knowing failure to remedy the harassment. On the other hand, in the case of harassment by a non-agent, liability would be imposed under Title VII whenever the entity knowingly failed to remedy the harassment, while liability would be imposed under the Petaluma I test only if the failure to remedy is caused by the discriminatory animus of an agent of the entity.

Since this Court issued its ruling in Petaluma I, several other courts have examined the standard to be applied in Title IX peer harassment hostile environment cases. The approaches taken have varied. That which most closely resembles this Court's approach in Petaluma I is found in Bosley v. Kearney R-1 School District, 904 F. Supp. 1006 (W.D. Mo. 1995).

The Bosley court found, as had this Court, that intentional discrimination on the part of the district is a required element of a claim for damages, holding that "plaintiff must show that the school district selected a particular course of action in response to her complaints of sexual harassment at least in part 'because of' plaintiff's sex." Id. at 1021. However, the Bosley court held that Title VII provides the most appropriate standard for enforcing the anti-discrimination provisions of Title IX. The Bosley court slightly modified the Title VII standard for entity liability, raising the test of "knew or should have known of the hostile environment and took no or insufficient remedial action," id. at 1023, (citing Murray v. New York University College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) (employer liability standard), to "knew of the harassment and intentionally failed to take proper remedial action." Id. at 1023.

The Bosley court specified that the required intent

could be established by inference. Id. at 1021. Thus, upon a showing that the plaintiff was subjected to harassment based on sex while participating in an educational program, and that the school district knew of the harassment and failed to take appropriate remedial action, the trier of fact could infer that the failure to take remedial action constituted intentional discrimination. Id. at 1025.

The Eleventh Circuit, in Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996), took a different approach. Like the Bosley court, that court found that Title VII principles should be applied in Title IX cases. However, unlike the Bosley court, it perceived no need to modify the Title VII standard for liability on the part of an entity. The Davis court discerned in Franklin's holding an intent to provide students with the same level of protection in school as employees have in the workplace. Id. at 1192-93, citing Franklin, 503 U.S. at 74-75. The Davis court found the extension of Title VII's substantive standards appropriate in light of the Supreme Court's mandate that Title IX be read broadly, North Haven Board of Education v. Bell, 456 U.S. 512, 521 (1982), and the Office of Civil Rights' use of Title VII standards in interpreting and enforcing Title IX. Davis, 74 F.3d at 1190, 1192. The Davis court perceived public policy reasons for ensuring that schoolchildren receive at least as much protection as workers:

> Indeed, where there are distinctions between the school environment and the workplace, they "serve only to emphasize the need for zealous protection against sex discrimination in the schools." The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by

> sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as acceptable behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, "[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program."

Id. at 1193, quoting Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993). Thus, Davis required no showing beyond that necessary under the Title VII standard to demonstrate the requisite intentional discrimination to support money damages against the entity.

The Fifth Circuit takes a wholly opposite view from that of the Eleventh Circuit, holding that not only must discriminatory intent on the part of the school district be specifically shown, but that it can be shown only by demonstrating that "the school district responded to sexual harassment claims differently based on sex." Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996). Under the Rowinsky approach, it is not enough that the school district intentionally permits an environment hostile to girls to exist and continue; rather, a school district may be held liable only if it affirmatively treats girls' complaints differently than boys' complaints. Id.

This Court rejects the Rowinsky approach, because it yields extreme results inconsistent with the body of discrimination law. Under the Rowinsky approach, if harassment exists only against girls, such that there are no complaints by boys providing a comparison point for the treatment of girls' complaints, girls are necessarily deprived of a remedy, even if the sexually hostile environment is extremely severe and pervasive, the school district actually knows of the hostile environment, and the district fails to take any action whatever to remedy it. Moreover, that would be so even if the school district's inaction was directly caused by discriminatory animus.

Moreover, Rowinsky is manifestly based on a fundamental misunderstanding of the nature of this type of claim. The majority opinion continually refers to the plaintiff's claim as being based on the conduct of the peer harassers rather than on the action and inaction of the school district, and its reasoning is based upon this characterization. Thus the court holds that "[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition," id. at 1013, and that the legislative history demonstrates that the statute was directed exclusively "to the practices of grant recipients." Id.

The actual thrust of this type of claim, is to impose liability on the school district based not on the harassing conduct of its students, but on the district's own conduct of knowingly permitting the discriminatory hostile and abusive environment to continue and to inflict an ongoing injury on its female students. Rowinsky does not recognize that inaction may constitute actionable discrimination. See Bator v. State of Hawaii, 39 F.3d 1021, 1029 (9th Cir. 1994) ("a supervisor who has been apprised of unlawful harassment... should know that her failure to investigate and stop the harassment is itself unlawful" under the Equal Protection

Clause) (emphasis added). This Court accordingly can take no guidance from the Rowinsky decision.

The Court does find persuasive the Bosley and Davis courts' decision to utilize Title VII standards and principles in Title IX cases. The appropriateness of using Title VII substantive standards in Title IX employment cases is by now well established. See, e.g. Preston v. Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203, 206 (4th Cir. 1994); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988); Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n. 6 (10th Cir. 1987), cert. denied, 484 U.S. 849 (1987). As the Lipsett court explained in a well-reasoned decision, borrowing the Title VII standard in Title IX employment actions is justified by the fact that Title VII and Title IX both prohibit the identical conduct of sex discrimination and by the legislative history of Title VII's exemption of educational institutions and bring employees of educational institutions within the scope of equal employment protection. 864 F.2d at 896-97.

The circuit courts have also looked to Title VII's substantive standards in Title IX actions brought by students. See, e.g., Murray, 57 f.3d at 248; Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993) but cf. Cohen v. Brown Univ., 991 F.2d 888, 901 (1st Cir. 1993) (declining to apply Title VII burden-of-proof-shifting procedure to Title IX claim, which is "a loosely laced buskin, inhospitable to the specialized choreography of presumption and production upon which the Burdine/McDonnell Douglas burden-shifting framework depends").

This Court agrees with the above authority that Title VII is the most useful and appropriate analogue in Title IX cases. The Court further agrees with the analysis of the

Davis court that sound public policy supports applying Title VII standards to student actions as well as employee actions under Title IX, without weakening the standards as applied to the students. In addition, this Court discerns in Title IX no intent to provide a lesser degree of protection to students than to employees.

With the benefit of hindsight, it now appears that the Davis approach most closely carries out the Franklin holding. While the Supreme Court's use in Franklin of the phrase "intentional discrimination" was ambiguous, its later use of that phrase in the context of Title VII hostile environment discrimination has clarified its meaning.

Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 1506 (1994), is a Title VII case involving a peer co-worker's sexual harassment and an immediate supervisor's failure to remedy the harassment. The Court examined the 1991 amendments to Title VII which permit recovery of compensatory damages against employers who violate Title VII. Those amendments set up the same dichotomy as did the Supreme Court in Franklin and Guardians for they limit the award of money damages to cases involving "intentional discrimination." While the amendments contain no formal definition, they appear to define intentional discrimination as any form of discrimination other than "an employment practice that is unlawful because of its disparate impact." 42 U.S.C. § 1981(a) (1).

In Landgraf, the Supreme Court premised its discussion of whether these amendments should be given retrospective application on the assumption that a hostile work environment based on co-worker harassment would support monetary damages against the employer under these amendments. Landgraf, 114 S. Ct. at 1489. The Court's discussion reveals that this assumption is based on its own characterization of such hostile environment discrimination as a form of

intentional discrimination. For example, the Court states that the amendment "confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged." Id. at 1506. The Court's discussion demonstrates that it assumes that the term "intentional discrimination" as used in the statute includes hostile environment sexual harassment. This is a persuasive indication that the Court's reference "intentional discrimination" in Franklin was similarly intended to include sexual harassment.

As this Court has noted in its previous orders, some language in Ninth Circuit authority could be read to suggest that the standard developed by the courts for finding liability in Title VII hostile work environment cases is not an intentional discrimination standard. Upon careful review of the hostile work environment case law, the Court concludes that the hostile work environment cause of action developed as a species of intentional discrimination, and that the Ninth Circuit authority which could be interpreted as holding otherwise should not be so interpreted.

This analysis begins with a brief overview of the two commonly used theories for proving Title VII violations, the disparate treatment theory and the disparate impact theory. The adverse affect on the protected class constitutes the discrimination, without any intent to single out any person or group of people because of their membership in that protected group.

The Title VII standard for sexually hostile work environment, as it has been developed by the courts, requires a plaintiff to prove (1) that she was subject to unwelcome harassment because of her gender (2) that the harassment was sufficiently severe or pervasive to create an abusive work environment, and (3) that there is a basis for employer liability. E.g., EEOC v. Hacienda Hotel, 881 F.2d at 1514-

15. This standard more closely resembles the standard under the traditional disparate treatment theory than that under the disparate impact theory.

The first prong of the hostile environment standard, like the disparate treatment standard, requires that the victim of the discrimination be singled out for adverse treatment by the harasser because of her membership in a group protected by Title VII. In contrast, the disparate impact test is wholly inapplicable to this prong, because the harassing conduct cannot be seen as facially neutral, and it would be absurd to inquire into any business necessity for it.

The third prong of the hostile environment test also contains a requirement of culpability with respect to the employer. The employer is liable for failing to remedy or prevent a hostile environment only if its management knew, or in the exercise of reasonable case should have known, of the existence of the hostile environment. Id. at 1515-16. The element of intent is less obvious in this prong than in the first prong of the standard. However, in Hacienda Hotel, adopting the "knew or should have known standard," the Ninth Circuit apparently intended the standard to be an intentional discrimination standard rather than a negligence standard. This is demonstrated by the court's citation to and reliance on Hunter v. Allis-Chalmers Corp., Engine Division, 797 F.2d 1417, 1421-22 (7th Cir. 1986), in support of the "knew or should have known" standard.

Hunter was decided under 42 U.S.C. § 1981.[3] Accordingly, the claim required proof of intentional discrimination. See, e.g., Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985); Vasquez v. McAllen Bag &

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[3] Hunter was originally brought under both Title VII and 42 U.S.C. § 1981, but the Title VII claim was abandoned, and the case was decided exclusively under § 1981.

Supply Co., 660 F.2d 686 (5th Cir. 1981), cert. denied, 458 U.S. 1122 (1982); Craig v. Los Angeles County, 626 F.2d 659 (9th Cir. 1980), cert. denied, 450 U.S. 919 (1981). Applying an intentional discrimination standard, the Hunter court found that "failure to take reasonable steps to prevent a barrage of racist acts, epithets, and threats can make an employer liable if management-level employees knew, or in the exercise of reasonable care should have known, about the campaign of harassment." 797 F.2d at 1421. The Hunter court made clear that such liability was not based upon the doctrine of respondeat superior. Id. Rather, the employer's liability is based on its own blameworthiness in failing to use reasonable care to prevent harassment in the workplace when the employer "has reason to know" of the harassment. Id. at 1422.

Other early hostile environment cases similarly demonstrate the courts' categorization of these claims as disparate treatment claims. For example, in Henson v. City of Dundee, 682 F.2d 897, 902-04 (11th Cir. 1982), the court explicitly treated the hostile work environment claim as a disparate treatment claim which required a showing of intentional discrimination. The court held that because the "essence of a disparate treatment claim" is a showing that a person is "intentionally singled out for adverse treatment on the basis of a prohibited criterion," a hostile work environment plaintiff must show that "but for the fact of her sex, she would not have been the object of harassment." However, the court noted, the intent need not be proved under the McDonnell Douglas prima facie case framework because, unlike other species of claimed disparate treatment, cases of sexual harassment creating a hostile environment do "not present a factual question of intentional discrimination which is at all elusive." Id. at 905 n.11. Accord, Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990)("[t]he

intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course").

These two elements of intent, the harasser's intentional disparate treatment based on gender and the employer's act of implicitly condoning that disparate treatment by knowingly failing to take steps to remedy it, are included within the elements of hostile work environment discrimination required under Title VII. Thus hostile environment sexual harassment is a type of intentional discrimination, but the intent is established by proof of the elements required to prove the cause of action and needs no additional proof.

This background explains why the recent cases under the 1991 amendments to Title VII simply characterize hostile work environment discrimination as a species of intentional discrimination, without discussion. See, e.g., Townsend v. Indiana Univ., 995 F.2d 691 (7th Cir. 1993); Raney v. District of Columbia, 892 F. Supp. 283 (D.D.C. 1995); Sassaman v. Heart City Toyota, 879 F. Supp. 901 (N.D. Ind. 1994); Splunge v. Shoney's, Inc., 874 F. Supp. 1258 (M.D. Ala. 1994); Preston v. Income Producing Management, Inc., 871 F. Supp. 411 (D. Kan. 1994); Meadows v. Guptill, 856 F. Supp. 1362 (D. Ariz. 1993); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024 (D. Nev. 1992). If there was ambiguity regarding whether hostile environment claims were a species of intentional discrimination, this ambiguity has now been resolved by virtue of the 1991 amendments and the case law applying those amendments.

This Court previously noted that Sischo-Nownejad v. Merced Community College District, 934 F.2d 1104 (9th Cir. 1991), could be interpreted to suggest otherwise. There the Ninth Circuit stated in dicta that there are three distinct theories for proving Title VII violations:

> A plaintiff may show violations of these statutes by proving disparate treatment or disparate impact, or by proving the existence of a hostile work environment. Disparate treatment involves intentional discrimination. Disparate impact involves a facially neutral employment criterion that has an unequal effect on members of a protected class; discriminatory intent need not be proved. A hostile work environment requires the existence of severe pervasive and unwelcome verbal or physical harassment because of a plaintiff's membership in a protected class.

Id. at 1109 (citations omitted). This discussion appears to state that hostile work environment is a different species of violation, not subsumed within the category of "disparate treatment." However, in contrast to the specific statement that no intent is necessary for a disparate impact claim, nowhere does Sischo-Nowiewad state that intentional discrimination is not an element of the hostile environment violation. Rather, the statement of the hostile work environment standard clearly contains the key element of intentional discrimination of singling out the victim because of her membership in a protected group. Further, in directly comparing traditional disparate treatment and hostile work environment, the only distinction the court made between these two types of claims was that traditional "disparate treatment, unlike a hostile working environment, need not involve physical and/or verbal harassment." Id. n.6. Thus, this case does not hold or imply that hostile environment is not a species of intentional discrimination. The language is fully consistent with the analysis of hostile environment as involving intentional discrimination but not requiring separate additional proof of the element of intent. The second case

which could be interpreted as contradicting the Court's present analysis is Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), a Title VII hostile environment case involving co-worker sexual harassment which contains the following language:

> Title VII is not a fault-based scheme. "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation" of co-workers or employers. Rogers [v. EEOC, 454 F.2d 234,] 239 [(5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)]; see also Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S. Ct. 849, 854, 28 L. Ed. 2d 158 (1971) (the absence of discriminatory intent does not redeem an otherwise unlawful employment practice).

Id. at 880. This language cannot be read as broadly as it first appears to be written. Its apparent suggestion that no Title VII claim requires discriminatory intent would be completely inconsistent with the well-established elements of disparate treatment claims under Title VII. Even with respect to hostile environment claims, this language is more limited than it appears. To understand its meaning, it is necessary to examine the area of the hostile environment test that the Ninth Circuit was addressing in making this point.

As noted above, there are three segregable elements of the hostile environment test. First, the plaintiff must be subject to unwelcome harassment based on her membership in a protected group. Second, the harassment must be sufficiently severe or pervasive to create an abusive environment. Third, the employer must know or be on notice of the hostile environment and fail to take appropriate remedial action. The first element contains an intent requirement with respect to the harasser, and the third element contains an

intent requirement with respect to the employer. However, the second element does not relate to intent at all; it relates only to the injury.

The above-quoted language in Ellison appears in the context of the court's discussion of the second element, the one element not related to intent. In particular, the court was addressing the question of what standard to use in measuring the severity and pervasiveness of the harassment. Wishing to avoid exposing employers to liability based on "the idiosyncratic concerns of the rare hyper-sensitive employee," the Ninth Circuit chose not to measure the extent of harassment based solely on the employee's subjective experience of it. Id. at 879. On the other hand, the court declined to use a "sex-blind reasonable person standard" on the grounds that such a standard "tends to be male-biased and tends to systematically ignore the experiences of women." Id. The court noted that:

> Sexual harassment is a major problem in the workplace. Adopting the victim's perspective ensures that courts will not "sustain ingrained notions of reasonable behavior fashioned by the offenders." Congress did not enact Title VII to codify prevailing sexists prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women."

Id. at 880-81 (footnote and citations omitted). The court therefore adopted a "reasonable woman" standard, holding that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create

an abusive working environment." Id. at 879. It was in this context that the Ellison court noted that the victim-based standard could result in a finding of severe and pervasive harassment even though the harassers themselves are too insensitive to realize that their conduct creates a hostile environment. Id. The court discounted this problem because Title VII is not a "fault-based scheme." Id. at 880.

Seen in its correct context, the discussion in Ellison is not inconsistent with viewing hostile environment as a species of "disparate treatment" or "intentional discrimination." This discussion relates solely on the issue of when an environment is sufficiently hostile to satisfy that element of a claim of violation of Title VII. To the extent that it relates to the intent requirement, it simply demonstrates that the first element does not require that the harasser intend his conduct to harass, but only that the harasser intend to select the recipient of his conduct on the basis of her gender, that is, to engage in disparate treatment based on sex. Notably, this discussion does not relate to the element of entity culpability at all.

The Ellison court's discussion of this point is also useful in comparing the workplace and the schoolhouse. The court supported its point that sexual harassment is a "major problem in the workplace" with statistics that over 40% of female federal employees reported incidents so sexual harassment in 1987 and in 1980. This statistic pales in comparison to the statistics regarding harassment in school. Celia B. Fisher, Ph.D., one of Defendants' experts, cites findings of a 1993 study by the American Association of University Women Educational Foundation that 85% of girls and 76% of boys report having been the victim of unwanted sexual comments or touching in school. Exhibit B to Declaration of Scott N. Kivel. Similarly, Jeffrey N. Younggren, Ph.D., another Defendants' experts, opines that sexual

harassment is not only very common among junior-high-aged students, but indeed "developmentally correct" in that population.

Thus it appears that school districts are on notice that student-to-student sexual harassment is very likely in their schools, particularly in junior high school. In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment. Thus the Title VII standard for intentional discrimination, which imposes liability where the entity knows or should have known of the hostile environment and fails to take remedial action, is the appropriate standard.

Defendants argue that application of the Title VII standard, without the addition of a separate intent requirement on the part of the entity, will improperly require the schools to create a harassment-free environment, a task which is impossible in any population, and particularly in a population of adolescents. Defendants are incorrect regarding the scope of the Title VII standard. It is not a strict liability standard, making entities responsible for every incident of harassment in the environment over which the entity exercises control. The Title VII standard disallows strict liability of entities for conduct of third parties in three ways. First, the plaintiff must prove that gender-based harassment was so severe or pervasive as to create a hostile environment that adversely affected the plaintiff's ability to function in the environment; thus, an entity cannot be liable for sporadic or minor incidents. Second, the plaintiff must prove that the entity actually knew, or should in the exercise of its legal duties have known, of the harassment. Third, even if a hostile environment exists, and the entity has actual or constructive

notice of it, the entity is not liable if it takes prompt, appropriate remedial action; this standard leaves room, therefore, for the court to allow schools an appropriate amount of discretion in determining how best to respond to harassment.

Defendants also argue that public policy weights against imposition of damages on school districts for student-to-student harassment, absent discriminatory animus on the part of the district's agents, because school districts would be unfairly caught between their obligation to avoid infringing the freedom of speech of the harassers and their duty to prevent harassment of the victim. This argument is not persuasive.

The school First Amendment cases cited by Defendants uniformly recognize that a student's freedom of expression is limited both by other students' rights and by the school's right and duty to maintain order. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512-3 (1969) (students entitled to express personal views unless expression will "substantially interfere with the work of the school or impinge upon the rights of other students"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, (1988) (same); Bethell Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (school may censor speech which would not be subject to censorship outside of school environment where the speech is inconsistent with the school's "basic educational mission"). Fraser explicitly recognized that a school must be permitted to "disassociate itself" from improper "sexually explicit" speech to demonstrate that such speech is "wholly inconsistent with the 'fundamental values' of public school education." 478 U.S. at 685-86.

Thus, the First Amendment cases not only permit schools, but specifically recognize a duty on the part of schools, to regulate the speech of their students in a manner consistent with proper education. The Office of Civil Rights

has found, in an agency interpretation of Title VI and in Letters of Finding with respect to Title IX, that this duty extends to taking appropriate action to prevent student-to-student harassment. As the OCR stated in its agency interpretation, "the unique setting and mission of an educational institution" imposes a special duty of care in this regard:

> In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.

Dep't of Educ., Racial Incidents and harassment Against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994). Therefore, public policy in fact supports imposition of a duty to take reasonable steps to prevent or terminate student-to-student harassment, enforceable in actions for compensatory damages. Further, public policy supports application to such claims of the traditional hostile environment framework developed in Title VII cases to prove the existence of, and entity liability for, intentional discrimination.

Conclusion

For the reasons stated above, Plaintiff's motion for reconsideration of this Court's interlocutory order of August 30, 1993 is GRANTED. The Court holds that the standard applicable to this action is the traditional Title VII hostile environment standard. Thus, the elements which Plaintiff must prove are that Plaintiff was subjected to unwelcome harassment based on her gender, that the harassment was so severe or pervasive as to create a hostile educational environment, and that the Defendants knew,or should in the exercise of their duties have known, of the hostile environment and

failed to take prompt and appropriate remedial action.

IT IS SO ORDERED.